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MAY 11

CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

NO. 10—ORIGINAL

STATE OF NEW JERSEY, Plaintiff,	In Equity.
Vs.	Application for Further Relief at the Foot of the Decree
CITY OF NEW YORK, Defendant.	

REPLY AND REPLY BRIEF

WILLIAM A. STEVENS,
Attorney-General.

DUANE E. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff-Petitioner.

May 11, 1933

Supreme Court of the United States

STATE OF NEW YORK,

CITY OF NEW YORK.

PLAINTIFF'S BRIEF

IN SUPPORT OF THE FOREGOING REPLY

I

"He who seeks equity must do equity." By leaving until the eleventh hour; nay, the twelfth hour, the presentation of alleged reasons for failure to comply with the solemn decree of this court, which reasons, if true, were known to the defendant at all times during the past eighteen months, and waiting until prodded by the plaintiff's motion, is not doing equity. The dignity of this court required more diligence, and more respect for its decree.

II

The financial difficulties alleged by the defendant are beside the point. All the necessary sites for incinerators were acquired prior to October 1, 1931. (Report on Re-reference pp 5-6).

Defendant admits that appropriations for all four incinerators recommended by the Special Master had long since been made when the hearings on re-reference were held in July, 1931 (Answer p. 10.) All that was then necessary was a resolution of defendant's Board of Estimate and Apportionment to make the funds immediately available. Defendant's officers so testified and the Special Master so found (Report on Re-reference p. 14). Defendant admits that plans and specifications for four incinerators were ready in September, 1931, before the decree was made (Answer p. 7).

The vague statement that "objectors appeared" when the matter of the four contracts came before The Board of

Estimate and Apportionment on December 15, 1931. (Answer pp. 7-8) presented no valid reason for laying over a matter then under the advice of this court. [illegible] this court [illegible] the matter [illegible] of [illegible]. If [illegible] and required diligence.

[illegible] solely [illegible] to the [illegible] corporate [illegible] the [illegible] of [illegible] (Answer p. 12) [illegible] explaining to [illegible] Special Master. He was given to understand differently (report on Re-reference p. 14). He was generous in his allowance of time, which was consented to by defendant in the stipulation for decree (284 U. S. 335, Brief supporting answer p. 13).

The cost of the four incinerators was relatively insignificant (Answer p. 11).

In paragraph 11 of the answer defendant refers to the reluctance of financial and banking houses to loan it money (p. 6). Its notorious extravagance was the reason for that reluctance.

For more than a year [illegible] funds of the Reconstruction Finance Corporation have been available for necessary public improvements. Other cities have obtained relief [illegible] source, but defendant has not sought such relief.

III

The statement in the answer of the maximum quantity of garbage and refuse dumped at sea (p. 12) is incorrect with respect to the summer months. The correct amount is 3,000 tons per day (Report on re-reference p. 4; 284 U. S. 335, 338).

V

Plaintiff respectfully urges that defendant's application for further relief be denied, and urges the prayer of its petition.

Respectfully submitted.

WILLIAM H. STEVENS,
Attorney-General.

DUANE R. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff-Petitioner.

May 11, 1932.

FILE COPY

APR 17 1931

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. [redacted] Original

STATE OF NEW JERSEY,

Plaintiff,

vs.

THE CITY OF NEW YORK,

Defendant.

Pleadings, Proposed Findings of Fact and Conclusions of Law, Special Master's Report and Defendant's Exceptions.

ARTHUR J. W. HILLY,
Corporation Counsel of the
City of New York,
Solicitor for Defendant.

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Motion.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1928.

No. 21, Original.

STATE OF NEW JERSEY,
Plaintiff,

vs.

THE CITY OF NEW YORK,
Defendant.

IN EQUITY.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

Comes now the State of New Jersey, by its Attorney-General, and asks leave of the Court to file its bill of complaint herewith submitted.

WILLIAM A. STEVENS,
Attorney-General.

DUANE E. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff.

May 13, 1929.

Statement.

The purpose of this suit is to restrain the defendant from committing a nuisance causing damage to the property of the plaintiff and its citizens and a menace to the health of its inhabitants, by dumping garbage and refuse in the Atlantic Ocean off the coast of the plaintiff.

WILLIAM A. STEVENS,
Attorney-General.

DUANE E. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff.

May 13, 1929.

Bill of Complaint.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1928.

No. 21, Original.

STATE OF NEW JERSEY, *Plaintiff,*

—against—

THE CITY OF NEW YORK, *Defendant.*

IN EQUITY.

BILL OF COMPLAINT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The plaintiff, State of New Jersey, by its Attorney-General, brings its bill of complaint against the defendant, The City of New York, and alleges and shows:

I.

1. The plaintiff is a State of the Union having its Capital and seat of government at the City of Trenton, Mercer County, New Jersey, and exercises through its Legislature the powers and duties of sovereignty within its territorial limits under and by virtue of its constitution, including the power and duty to protect and preserve to its citizens certain natural and unalienable rights, including

the acquisition, possession and protection of property and of pursuing and obtaining safety and happiness. This suit is instituted by direction of the Legislature of the plaintiff and with the approval of the Governor thereof, for the use and benefit of the plaintiff as the owner of the property hereinafter mentioned and also as *parens patriae* for the use and benefit of its citizens. Annexed hereto as Exhibit "A" and made a part hereof is a map showing certain geographical and other information referred to in this bill of complaint.

2. The defendant, The City of New York, is a body politic and corporate, organized and existing under and by virtue of the laws of the State of New York, under and by the authority of which it exercises the powers of local administration and government as a political subdivision of said State, having its seat of government in the Borough of Manhattan, in the City, County and State of New York.

II.

3. The jurisdiction of this Court depends upon the ground that this is a suit in which a state is a party, within the provisions of Article III, Section 2, of the Constitution of the United States.

III.

4. From Atlantic Highlands southerly to Cape May, a distance of more than 100 miles, the easterly side of the State of New Jersey borders on the Atlantic Ocean. The portion of this Ocean frontage particularly affected by the acts of the defendant hereinafter complained of extends from Atlantic Highlands to Beach Haven, a distance of more than fifty miles, and is occupied by a continuous succession of adjoining municipalities, which, by reason

of their broad and gently sloping beaches, are adapted to, and their inhabitants are engaged in and rely for their livelihood chiefly upon, the business of maintaining summer resorts, where great numbers of people of all classes and conditions congregate from various parts of the United States in the pursuit of rest, recreation and pleasure.

5. The plaintiff possesses the sovereign ownership of lands along the shore and under the waters of the Atlantic Ocean below high water mark throughout its beach front within its territorial limits, and the use of said beaches and the waters adjacent thereto are common to all the people of the State.

6. Said seashore is famous throughout the United States as a summer resort, and is improved by piers and wharves which are used for public recreation, commerce and fisheries, and by pavilions and bathing beaches and other conveniences used for the health, recreation and pleasure of the citizens of the plaintiff, and others who resort thereto for such purposes. Along the seashore and for several miles landward the territory is improved by hotels, pleasure resorts, country clubs, private residences and magnificent estates, provided and maintained at great expense by or for the benefit of summer visitors and residents.

7. The waters of the ocean adjacent to said shore and beaches are largely used for surf bathing and also for pleasure boating, fishing and other purposes. More than a hundred million dollars have been invested within the beach section particularly affected by the acts of the defendant hereinafter complained of, in Hotels, bathing pavilions, landing and pleasure piers, boardwalks, shore boulevards, and other appurtenant facilities for pleasure, recreation and profit and several thousand persons are constantly employed to maintain and operate the same.

8. The section of the sea coast in question lies between the two great metropoltian areas of New York City and Philadelphia, containing an aggregate population in excess of 12,000,000 people, and all parts thereof are within convenient commuting distance for daily travel by rail or motor vehicles from one or the other of said metropolitan areas. Many thousands of persons live along said seashore during the summer months, and commute daily to their places of business. Said seashore is visited by thousands of excursionists daily during the summer months, and also by many thousands of visitors over holidays and week-ends.

9. The growth, prosperity, and substantial property values of the seashore communities in question have resulted entirely from enterprises dependent upon the popularity and suitability of said waters, beaches and shorefront facilities for fishing, boating, bathing and other seashore recreations and pursuits, and the continuance of these advantages depends primarily upon the ability of the plaintiff, its municipalities and its citizens to keep the waters of the shore and bays pure and wholesome, and the beaches, public highways and shorefront property free from pollution, contamination and unsightly or unhealthy conditions.

10. Along the beach section in question are located more than a hundred fish pounds constructed under licenses issued by the plaintiff, and maintained by its citizens, who have invested therein approximately $700,000. During the year 1928 said fish pounds yielded approximately twenty million pounds of fish having a value of nearly one million dollars. Approximately 500 men are constantly employed in said industry.

11. The defendant, the City of New York, has a population of more than 6,000,000 people, which is increasing

at the rate of approximately 136,000 persons annually. Said defendant disposes of its garbage and other refuse by loading the same upon barges, which are towed out and dumped into navigable waters of the United States, off the coast of the plaintiff.

12. As the population and commerce of said defendant increases the amount of garbage and refuse thus disposed of constantly increases and at the present time many barge loads are thus disposed of daily.

13. Said garbage and refuse consist of all manner of domestic and industrial waste of a substantial nature, including boxes, crates, tin cans, bottles (empty, or containing drugs, medicines or chemicals), papers, rags, discarded household and toilet articles, dead domestic animals, mattresses, decayed or unmarketable fruits, vegetables, meats and fowls, the sweepings and refuse of public streets and markets, victuals and other vegetable and animal fragments from residences, hotels and restaurants; much of which garbage and refuse is in a putrid and decayed condition.

14. A considerable proportion of said garbage and refuse floats upon or beneath the surface of the sea in huge masses or islands, which obstruct and impede the navigation of fishing boats and other craft, until it is driven by winds and tides upon the beaches of the plaintiff, and cast by the waves into heaps and windrows thereon and under, over and above the piers, wharves and pavilions, adjacent boulevards and private property, where it decays and pollutes the sea and land, unless and until removed and disposed of by the municipalities or their citizens.

15. The removal and disposition of said accumulated garbage and refuse from the beaches, boulevards and

other public places requires an expenditure by said municipalities of more than $100,000 per annum, and additional large sums by the citizens of the plaintiff to clean and repair their private property of the filth and damage inflicted thereby.

16. Said garbage and refuse so co-mingled with the waters of the shore and cast upon the beaches and property of the plaintiff and its citizens is poisonous and otherwise injurious to human beings and to fish and other forms of marine life; obstructs and impedes the navigation of the waters of the United States; clogs, tears, injures and destroys the nets of the fish pounds; and renders the waters noxious and offensive and unfit for fishing, boating or bathing.

17. The dumping of said garbage and refuse by the defendant creates a public nuisance which seriously impairs the usefulness, wholesomeness and safety of said waters, beaches and shore front facilities, and of the property of the plaintiff, said municipalities and their citizens, and thereby greatly damages the property and seriously menaces the health, safety and welfare of the plaintiff and its citizens.

18. Said acts of the defendant are repeated and continued from day to day and, unless restrained, will be repeated and continued in perpetuity, to the manifest and irreparable injury of the health, safety, comfort, property and welfare of the plaintiff and its citizens and to others lawfully within the borders of the State, and the plaintiff is without any adequate remedy at law in the premises.

19. Said acts of the defendant takes the property of the plaintiff and its citizens without due process of law in violation of Article XIV, Section 1, of the Constitution of the United States.

20. Said acts of the defendant regulate and destroy the commerce of the plaintiff and its citizens in violation of Article I, Section 8, paragraph 3 of the Constitution of the United States.

21. Said acts of the defendant deprive the plaintiff and its citizens of the natural advantages of their position along the seashore, contrary to the sovereign rights of the plaintiff as a member of the Union.

22. Said acts of the defendant violate Title 33, Chapter 9, Section 407 of the United States Code (approved June 30, 1906) and other laws of the United States.

23. Said acts of the defendant are otherwise detrimental to the interests of the plaintiff and its citizens.

IV.

In consideration whereof, and for as much as the plaintiff is without adequate remedy in the premises, at and by the strict rules of the common law, and can only obtain relief in this Honorable Court, where matters of this nature are properly cognizable and relievable;

To the end, therefore, that the said defendant, the City of New York, may to the best and utmost of its knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived;

May it please the court, the premises considered, to grant unto the plaintiff the United States' writ of injunction, issuing out of and under the seal of this Honorable Court, to be directed to the said defendant, The City of New York, perpetually restraining and enjoining it, its contractors, officers, agents and employees, and all other

persons acting or claiming or assuming to act under [illegible] authority, from dumping, or procuring or suffering to [illegible] dumped, any garbage or refuse, or other noxious, offensive or injurious matter, into the Ocean or other waters of the United States off the coast of New Jersey, and from otherwise defiling or polluting said waters and beaches or procuring them to be defiled or polluted as aforesaid.

May it please the court, the premises considered, to grant unto the plaintiff the United States' writ or subpoena, issuing out of and under the seal of this Honorable Court, to be directed to the said defendant, The City of New York, commanding it, by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honors in this Honorable Court, then and there to answer all and singular the said premises, and to stand to, abide by and perform such order and decree therein as to your Honors shall seem meet, and shall be agreeable to equity and good conscience.

And that the plaintiff may have such further or other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

And the paintiff, as in duty bound, will ever pray, etc.

STATE OF NEW JERSEY,

By WILLIAM A. STEVENS,
Attorney-General.

DUANE E. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff.

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ION AND DEVELOPMENT

SEACOAST

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MILES

EXHIBIT A.

MAP IS TOO LARGE TO BE FILMED

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1928.

No. 21, Original.

STATE OF NEW JERSEY,
Plaintiff,

—*against*—

THE CITY OF NEW YORK,
Defendant.

ANSWER OF THE DEFENDANT, THE CITY OF NEW YORK.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now, comes the defendant, The City of New York, by Arthur J. W. Hilly, its Corporation Counsel and its Solicitor herein, and, reserving all manner of benefit by objection, exception or otherwise to the many defects, errors, insufficiencies, imperfections and discrepancies in the plaintiff's Bill of Complaint contained, for its answer to the said Bill of Complaint the defendant, The City of New York, respectfully shows to the Court and alleges as follows:

First—That it is without knowledge as to all and singular the allegations contained in that item or division of the Bill of Complaint which is designated "I.", except as to so much thereof as alleges or purports to

allege that the plaintiff is one of the States of the United States of America having its Capitol and seat of Government at the City of Trenton in the State of New Jersey, and except as to the allegations contained in that paragraph or section thereof which is numbered "2".

As to the item or division of the Bill of Complaint which is designated "III," the defendant, The City of New York, says:

Second—That it denies all and singular the allegations contained in those sections or paragraphs of the Bill of Complaint which are respectively numbered 12, 13, 14, 17, 18, 19, 20, 21, 22 and 23.

Third—That it is without knowledge as to all and singular the allegations contained in those sections or paragraphs of the Bill of Complaint which are respectively numbered 4, 5, 6, 7, 8, 9, 10, 15 and 16, and therefore denies the same.

Fourth—That it denies all and singular the allegations contained in the paragraph or section of the Bill of Complaint which is numbered 11 except as to so much thereof as alleges that the defendant, The City of New York, has a population of more than 6,000,000 people which is continuously increasing.

Further answering and for a first defense, the defendant, The City of New York, further alleges:

Fifth—That the Bill of Complaint herein does not state facts sufficient to constitute a cause of action in equity, nor any matter of equity entitling the plaintiff to the relief prayed for or to any relief, nor are the facts stated in the Bill of Complaint sufficient to entitle the plaintiff to any relief against the defendant.

Wherefore, the defendant, The City of New York, prays judgment that the Bill of Complaint herein be dismissed and that it be hence dismissed with its costs and disbursements in this cause sustained and for such other and further relief to this defendant as to the Court may seem meet and proper in the premises.

THE CITY OF NEW YORK,
By ARTHUR J. W. HILLY,
Corporation Counsel,
Solicitor for the Defendant.

J. JOSEPH LILLY,
Of Counsel.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. 18, Original.

STATE OF NEW JERSEY,
Plaintiff,

—against—

THE CITY OF NEW YORK,
Defendant.

IN EQUITY.

MOTION FOR LEAVE TO FILE A REPLY AND FOR THE APPOINTMENT OF A SPECIAL MASTER.

Comes now the State of New Jersey, by its Attorney-General, and asks leave of the Court to file its reply, herewith submitted, and also for the appointment of a Special Master to take testimony and prepare and file his findings, with recommendations for a decree herein.

WILLIAM A. STEVENS,
Attorney-General.

DUANE E. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff.

October 7, 1929.

Reply.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. 18, Original.

STATE OF NEW JERSEY,
Plaintiff,

—against—

THE CITY OF NEW YORK,
Defendant.

IN EQUITY.

REPLY.

The plaintiff joins issue on the answer of the defendant.

WILLIAM A. STEVENS,
Attorney-General,

DUANE E. MINARD,
Assistant Attorney-General,
Solicitors for Plaintiff.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. 18, Original.

STATE OF NEW JERSEY,
Plaintiff,

—against—

THE CITY OF NEW YORK,
Defendant.

NOTICE.

To:

Hon. WILLIAM A. STEVENS,
Attorney-General of the State of New Jersey;

Hon. DUANE E. MINARD,
Assistant Attorney-General of the State of New Jersey,
Solicitors for the Plaintiff.

SIRS:

PLEASE BE ADVISED that on Monday, February 2d, 1931, the defendant, The City of New York, will apply to the above named Court for leave to file its Amended Answer herein, a copy of which is annexed hereto, and for the relief prayed for in the annexed motion.

Dated, January 27, 1931.

ARTHUR J. W HILLY,
Corporation Counsel,
Solicitor for the Defendant,
The City of New York.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. 18, Original.

STATE OF NEW JERSEY,
Plaintiff,

—against—

THE CITY OF NEW YORK,
Defendant.

AMENDED ANSWER OF THE DEFENDANT, THE CITY OF NEW YORK.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now, comes the defendant, The City of New York, by Arthur J. W. Hilly, its Corporate Counsel and its Solicitor herein, and, reserving all manner of benefit by objection, exception or otherwise to the many defects, errors, insufficiencies, imperfections and discrepancies in the plaintiff's Bill of Complaint contained, for its amended answer to the said Bill of Complaint the defendant, The City of New York, respectfully shows to the Court and alleges as follows:

First—That it is without knowledge as to all and singular the allegations contained in that item or division of the Bill of Complaint which is designated "I," except as to so much thereof as alleges or purports to allege

that the plaintiff is one of the States of the United States of America having its Capitol and seat of Government at the City of Trenton in the State of New Jersey, and except as to the allegations contained in that paragraph or section thereof which is numbered "2."

As to the item or division of the Bill of Complaint which is designated "III," the defendant, The City of New York, says:

Second—That it denies all and singular the allegations contained in those sections or paragraphs of the Bill of Complaint which are respectively numbered 12, 13, 14, 17, 18, 19, 20, 21, 22 and 23.

Third—That it is without knowledge as to all and singular the allegations contained in those sections or paragraphs of the Bill of Complaint which are respectively numbered 4, 5, 6, 7, 8, 9, 10, 15 and 16, and therefore denies the same.

Fourth—That it denies all and singular the allegations contained in the paragraph or section of the Bill of Complaint which is numbered 11 except as to so much thereof as alleges that the defendant, The City of New York, has a population of more than 6,000,000 people which is continuously increasing.

Further answering and for a first defense, the defendant, The City of New York, further alleges:

Fifth—That the defendant, The City of New York, has for many years last past dumped the garbage and some refuse collected by it in the Atlantic Ocean under the supervision of the Supervisor of the Harbor of New York and in accordance with and only after the issuance of permits by said supervisor under the authority conferred

on him by Chapter 496 of the Laws of United States of 1888, June 29, Sec. 1 (25 Statutes 209, as amended, now Title 33, Chapter 9, Sections 441, 443, 449 and 451, United States Code, approved June 30, 1926), at points 8, 12 and 20 miles southeast of Scotland Lightship and about 10, 12½ and 22 miles distant respectively from the New Jersey shore (being greatly in excess of one marine league from said shore) and not within the navigable waters of said State of New Jersey or of the United States; that in view of the dumping of said garbage and refuse on the high seas by said City of New York in the manner and at the points aforesaid, this Court has no authority to enjoin said City, the defendant herein, from said dumping of garbage and refuse so performed.

Further answering and for a second defense, the defendant, The City of New York, further alleges:

Sixth—That garbage and refuse in large quantities, including fruit, fruit skins, pieces of meat, vegetables, mattresses, electric light bulbs, pillows, bottles of all sorts, tin cans, boards, barrels, crates and parts thereof, and other pieces of wood, has for many years last past been and is being dumped into the Atlantic Ocean from steamships and other floating equipment, both inside and outside of the entrance to New York Harbor and into the sea lane for vessels clearing for ports south of New York and returning therefrom at distances from 2½ to 8 miles from the shore of New Jersey from Highlands to Barnegat Lighthouse; that cargoes of condemned foodstuffs are and have been for many years past dmped into the sea at a point about 25 miles southeast of Scotland Lightship; that private contractors (i. e. other than those employed in connection with dumping of garbage by The City of New York) have for many years last past dumped under permits issued by the Supervisor of the Harbor of New

York under said Title 33, Chapter 9, Sections 441, 443, 449 and 451, United States Code, into the Atlantic Ocean at points from 3 to 8 miles southeast of Scotland Lightship, excavated and refuse material from demolished buildings in the City of New York, which material often contains large quantities of refuse, especially boards, planks, barrels, barrel staves, crates and other pieces of wood, also bottles of all sorts, tin cans, etc.; that such private contractors and the United States Navy Yard, located in the City of New York, also for many years last past, have been dumping garbage into said ocean, either at points from 8 to 20 miles distant southeast from said Scotland Lightship or nearer thereto under such permits issued by the Supervisor of the Harbor of New York, as aforesaid; that insufficiently treated and foul and unsanitary sewage from the cities of Long Branch and Asbury Park on the coast of New Jersey has been, for a number of years last past, and is being discharged into the Atlantic Ocean a short distance from the beach at each of those cities; that all of said garbage, refuse, sewage and other offensive matter is of the same kind and character as that dumped by The City of New York at points from 8 to 20 miles southeast of Scotland Lightship and from 10 to 22 miles from the New Jersey shore; that such garbage, refuse, sewage and other offensive matter discharged as aforesaid by private contractors, by the United States Navy Yard authorities and by said New Jersey cities into the waters of the Atlantic Ocean in large quantities, would float under the influence of the tide and winds into the waters and onto the beaches of the State of New Jersey and its municipalities claimed to be polluted in this action, and it is impossible to determine whether garbage, refuse and other offensive matter in substantial quantities dumped into the sea as aforesaid by The City of New York is deposited in the waters of the State of New Jersey and on its beaches or in

greater quantities than garbage, refuse and offensive matter deposited in the sea by other agencies than The City of New York, as aforesaid, and that if any injury or damage is suffered by the State of New Jersey and/or its citizens or inhabitants or to their health, safety or property, it is not and cannot be chargeable to the acts of the defendant.

Further answering and for a third defense, the defendant, The City of New York, further alleges:

Seventh—That the Bill of Complaint herein does not state facts sufficient to constitute a cause of action in equity, nor any matters of equity entitling the plaintiff to the relief prayed for or to any relief nor are the facts stated in the Bill of Complaint sufficient to entitle the plaintiff to any relief against the defendant.

WHEREFORE, the defendant, The City of New York, prays judgment that the Bill of Complaint herein be dismissed and that it be hence dismissed with its costs and disbursements in this cause sustained and for such other and further relief to this defendant as to the Court may seem meet and proper in the premises.

THE CITY OF NEW YORK,
By ARTHUR J. W. HEALY,
Corporation Counsel,
Solicitor for the Defendant.

ELLIOT S. BENEDICT,
J. JOSEPH LILLY,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 17, ORIGINAL.

STATE OF NEW JERSEY, *Plaintiff,*

—*against*—

THE CITY OF NEW YORK, *Defendant.*

The defendant herewith submits its proposed findings of fact which it deems established by the evidence and its proposed conclusions of law which it requests that the Special Master find and make.

Dated, New York, February 25, 1931.

ARTHUR J. W. HILLS,
Corporation Counsel of The City
of New York,
Solicitor for the Defendant.

Findings of Fact.

1. That the City of New York is a domestic municipal corporation created by and existing under the laws of the State of New York, under and by which its exercises local administration and government as a political subdivision of said State.

[See complaint allegations, undenied.]

2. That the plaintiff is one of the States of the United States of America and was and is authorized to bring this suit by the Legislature of said State, with the approval of its Governor.

[See complaint allegations, undenied.]

3. By Chapter 378 of the Laws of 1897, of the State of New York, known as The Greater New York Charter, various municipalities of the State of New York were united and consolidated into the City of New York, which was thereby divided into five boroughs, known, respectively, as the Boroughs of Manhattan, The Bronx, Brooklyn, Queens, and Richmond.

4. That at the time of the commencement of this suit the population of said city exceeded six million people.

5. By said Chapter 378 of the Laws of 1897 of the State of New York a Department of Street Cleaning was created in the municipal government of said City, with jurisdiction over the removal and disposition, as often as the public health required, of ashes, refuse, street sweepings and garbage collected in said city.

6. By Chapter 466 of the Laws of 1901 of the State of New York, amending Chapter 378 of the Laws of 1897, jurisdiction over the removal and disposition of said ashes, refuse, street sweepings and garbage of the Boroughs of Queens and Richmond was transferred from the Department of Street Cleaning to the respective borough presidents of said boroughs of said city.

7. That by Local Law No. 13 of 1929 of The City of New York (duly adopted by the Municipal Assembly of The City of New York, in accordance with the provisions of Chap. 363 of the Laws of 1924 of the State of New York), in force from and after December 1st, 1929, amending and supplementing said provisions of said Greater New York Charter, as amended, a Department of Sanitation was created, to which was transferred jurisdiction over the removal and disposition of ashes, refuse, street sweepings and garbage collected in all of said five boroughs of said City.

[For references pars. 3-7 inclusive hereof, see Appendix to Brief.]

8. That from the latter part of 1896 to 1918, with the exception of a few months in the year 1903, The City of New York did not deposit any garbage or refuse at sea.

[See par. 9.]

9. That during said period (1896 to 1918) all New York City garbage was disposed of by reduction (burning) at Barren Island (in Jamaica Bay) at the plant of the New York Sanitary Utilization Company.

[For references pars. 8-9, see brief, p. 5; also S. M. pp. 1706-1707; Pr. A. 566-567; Plff.'s Exs. 321, 322, 323.]

10. That The City of New York has never collected and disposed of the garbage from manufacturing buildings, hotels, etc.

[See S. M. 1703; Pr. A. 565.]

11. That it has been the practice of The City of New York during said years to take some of its street sweepings and refuse to fill in low-lying city land, although a substantial portion thereof was dumped at sea.

[S. M. p. 1703-1704; Plff.'s Ex. 326.]

12. That early in 1918 The City of New York entered into a contract for the disposition at a plant at Linoleumville, Staten Island (Borough of Richmond), of all garbage collected, but in October, 1918, the contractor went into bankruptcy, and disposal thereunder ceased.

[S. M., pp. 1707-1708; Pr. A. 567; Brief, p. 6.]

13. That the City of New York then tried to re-let such contract by advertising for bids therefor, but on account of war-time conditions, no offers to undertake such a contract were received from contractors.

[S. M., p. 1708, Pr. A. 567; Brief, p. 6.]

14. That the City of New York then requested permission from the United States Government through its Supervisor of the New York Harbor to permit the dumping of its garbage at sea as a temporary or emergency measure, and the request was granted.

[S. M., pp. 1708, 1730, Pr. A. 567, 575; Brief, p. 7.]

15. That on collection this garbage is taken to docks or dumping boards on the waterfront of said city and is then dumped into city-owned barges, which are designated by the initials of the departmental name and letters of the alphabet, and these are towed to sea by tug-boats chartered from and in charge of contractors, and the contents are there dumped.

[S. M., pp. 1634, 1703, 1726-1727, 1738, Pr. A. 545, 565, 574, 578.]

16. That a committee of New York City officials and other persons was, about 1919, formed to devise a method for the disposition of garbage other than dumping at sea, and after much discussion and investigation of methods employed by other cities, it was determined to resort to incineration rather than reduction.

[S. M., pp. 1709-1711, Pr. A. 567-568.]

17. That three incineration plants were built in the Borough of Manhattan as a result of an appropriation of $5,000,000 made in July, 1921, the first being completed in February, 1924, the second in November, 1925, and the third on October 1, 1928, the cost of each incinerator being about $1,000,000 exclusive of the cost of the land on which built.

18. That all of said plants consume more than their contract capacity of garbage, the first by running 24 hours a day, disposing of 450 tons daily, the second by running 24 hours a day, disposing of 370 tons daily, and the third by running 24 hours a day, disposing of about 400 tons daily.

[Pars. 17-18 see S. M. 1712-1716, Pr. A. 569-570.]

19. That the commencement of building operations on a fourth site was halted by injunction duly obtained in the Supreme Court of the State of New York.

[S. M. 1716-1717, 1719, Pr. A. 570, 571; 214 App. Div. (N. Y.) 70.]

20. That in the Borough of Brooklyn there are two incinerators, each with a capacity of 100 tons a day, and three with a capacity of 500 tons a day each, all now in operation, built by a contractor under a contract to dispose of all material that may be delivered and since December 1st, 1929 no garbage from that borough has been dumped at sea.

[S. M. 1718, 1723, Pr. A. 570-571, 572.]

21. That in the Borough of Queens there are now nine incinerators operating, with an average daily garbage and refuse consumption of from 100 to 270 tons, and that borough has never dumped any of its garbage at sea.

[S. M. 1722-1723, Pr. A. 572.]

22. That in the Borough of Richmond there are now three incinerators in operation and none of the garbage from that borough has been or is now being dumped at sea.

[S. M. 1722-1723, 1797, Pr. A. 572, 593.]

23. That garbage dumping at sea is done by the City of New York practically every day of the year, except when heavy weather prevents, two or more scows often dumping one after the other near the same spot, each scow containing about 1200 to 1300 cubic yards of garbage and ashes.

[S. M. 1611, 1653-1654, 1727; Pr. A. 539-540, 550, 574.]

24. That approximately only 27% of the garbage collected in the City of New York is dumped at sea, the greatest proportion of which comes from the Borough of The Bronx, and such amount will be continually reduced.

[S. M. 1724, 1747; Pr. A. 572-573, 580.]

25. That an average of about 120,000 cubic yards of garbage is dumped at sea monthly throughout the year, ranging from 192,000 cubic yards in June, 1929, to about 52,000 cubic yards in February, 1930.

[S. M. 1742-1744; Pr. A. 579.]

26. That the Department of Sanitation has planned for the construction of nineteen additional incinerators, five 500-ton plants in Manhattan, four 500-ton plants in The Bronx, five 500-ton plants in Queens and five 500-ton plants in Brooklyn, and the reconstruction of two plants in Richmond, and this program contemplates completion of the last of these incinerators in 1934.

[S. M. 1796; Pr. A. 592-593.]

27. That the scows of private contractors having no connection with the City of New York containing "cellar dirt", *i. e.*, debris from buildings that have been torn down consisting of joists, timbers, laths, plaster, etc., of a very light kind, have for years been dumped and are being dumped into the Atlantic Ocean under permit from the Supervisor of the Harbor of New York at a point about four miles southeast of Scotland Light Ship.

[S. M. 1607, 1638, 1644-1645; Pr. A. 537, 545, 547.]

28. That in such scows so dumped, much other material is often placed consisting of rags, barrel staves, broken boxes, planking up to ten feet in length, milk bottles, mayonnaise bottles, ketchup bottles, tin cans, bottle covers and caps with the name "Sheffield Farms, Grade A, Pasteurized Milk", "Sealect Certified Milk" thereon, garbage (onions, grape skins, scallops) leather harness, grapefruit skins, banana skins, magazines, etc.

[S. M. 1803-1822; Pr. A. 595-602; Deft.'s Exs. 6, 7.]

29. That garbage has for many years been and is being dumped at sea from scows of the City of New York under permits issued by the Supervisor of the Harbor of New York and such scows when going to sea are accompanied by a United States Dumping Inspector to enforce requirements that dumping does not take place short of the designated dumping grounds.

[S. M. 1602-1604, 1606; Pr. A. 535-537; Brief, 13-17.]

30. That reports of said dump inspectors were received in evidence showing that dumping by defendant's garbage scows had been made in accordance with the requirements of the permits issued.

[S. M. 1614-1619; Pr. A. 541, Deft.'s Exs. 1-3.]

31. That inspection of outward and inward bound City scows or tows is also made by United States Patrol boats to note the time of going out and coming in for checking by said Supervisor's office to see whether the elapsed time between departure and return is sufficient for reaching and returning from said dumping points.

[S. M. 1604; Pr. A. 536.]

32. That the New York City garbage scows have for years dumped their loads under permit from the Supervisor of the Harbor of New York for three or four months in mid-winter at a point about 8 miles southeast of Scotland Light Ship, being about 12 miles from the New Jersey shore; for three or four months in summer at a point about 20 miles southeast of such Light Ship or about 22 miles off the New Jersey shore, and for two short periods between these times at a point about 12 miles southeast of such Light Ship or about 12½ to 13 miles from the New Jersey shore.

[References to 29, 30, 31 and 32 see S. M. 1606, 1656, 1948; Pr. A. 537, 551, 637.]

33. That cargoes of condemned food stuffs (vegetables, fruits, etc.), are also dumped at sea under permit from the Supervisor of the Harbor of New York at a point 25 miles from the New Jersey shore.

[S. M. 1610, 1860-1861, 1918; Pr. A. 539, 616, 629.]

34. That Brooklyn Navy Yard scows, containing refuse and garbage, also dump at sea at the regular dumping points at which New York City garbage is dumped.

[S. M. 27, 1612-1613; Pr. A. 540.]

35. That the Supervisor of the Harbor of New York, in his report for 1929, stated that it is probable that a great deal of garbage is dumped both outside and inside the harbor entrance by the enormous tonnage passing in and out of New York Harbor, and also that the local floating equipment throws more or less garbage overboard.

[S. M. 1622; Pr. A. 541-542, Pltf.'s Ex. 335, p. 2081.]

36. That the records of the Collector of the Port of New York show that in 1928-1929 the following was the number of vessels clearing from and entering such port from points south thereof for periods of two months at a time:

> Months of December, 1928, and January, 1929, foreign and coastwise vessels entering, 1,227; clearing, 1,173.
>
> Months of July and August, 1929, foreign and coastwise vessels entering, 1,105; clearing 1,192.

or on an average of about 40 vessels per month.

[S. M. 1661-1664; Pr. A. 553-554.]

37. That the sea lane or route for coastwise ships going to and coming from points south of New York is about 2½ to 3 miles off the New Jersey coast at Sea Bright, Monmouth Beach and Asbury Park; 5 miles at Sea Girt, and 8 miles at Barnegat Light House.

[S. M. 1660, 1762; Pr. A. 553, 584.]

38. That practically all freight and passenger ships leaving and entering New York harbor (especially those leaving) dump more or less garbage and refuse in such sea lane.

[S. M. 1664-1667, 1763-1765, 1975, 1985-1986; Pr. A. 554-555, 584-585, 643, 646.]

39. That many freight and passenger lines and ships feed their crews in port and none of their garbage or refuse is removed by the City or disposed of by the ship while in port, but such accumulations, consisting of bottles, tin-cans, eletric light bulbs, pieces of meat, fruit, other food waste, wood, mattresses, pillows, shoes, old clothes, boxes,

barrels, crates, etc., are dumped after passing south of Scotland Lightship.

[S. M. 1665-1668, 1763, 1888, 1990; Pr. A. 554-555, 584, 624, 647-648.]

40. That passenger and freight ships often anchor in great numbers during a fog for 24 hours or more just outside of the harbor and dump garbage accumulated during that period into the sea, where they are anchored.

[S. M. 1667-1668; Pr. A. 555-556.]

41. That the holds of cargo boats are usually swept in port after the removal of the cargo (and before reloading); such sweepings, and also sweepings from the forecastle, are placed on deck for dumping in addition to garbage and refuse, and all are dumped in said sea lane for coastwise ships shortly after passing Scotland Lightship on the way south.

[S. M. 1667-1669, 1763-1764, 1857-1890, 1890-1893, 1989, 1993; Pr. A. 560-561, 584, 615, 625, 647, 648.]

42. That fruit, vegetables, poultry, and other food supplies delivered to the ships in port to feed passengers and crews, are usually packed in crates, barrels and boxes, which have the names on them of the New York dealers from whom they are bought, and such crates, boxes and barrels, partly broken up, are, on most ships, piled on deck and dumped, with other refuse, in said sea lane shortly after passing Scotland Lightship on the way south.

[S. M. 1668-1669, 1765-1766; Pr. A. 556, 585.]

43. That the United States Government, through the Supervisor of the Port of New York, maintains shore dump inspectors, and also patrol boats which patrol New York Harbor and adjacent waters, to see that the Government requirements of the dumping permits are complied with.

[S. M. 25, 81, 1608-1609, 1910, 1918, 1934; Pr. A. 8, 22, 537-538, 627, 628, 633.]

44. That both steamship lines and City scows occasionally violate United States Government regulations in respect to dumping but the City has always endeavored to co-operate with the Government when the matter has been brought to the attention of the Commissioner of Street Cleaning and the Commissioner of Sanitation.

[S. M. 1921-1922; Pr. A. 630.]

45. That insufficiently treated and unsanitary sewage from the cities of Long Branch and Asbury Park on the Atlantic Coast of New Jersey, has been and is being discharged into the Atlantic Ocean within a short distance from the beaches at each of those cities.

[S. M. 1849-1854, 1870-1871, 2005-2006; Pr. A. 612-614, 619, 653, Deft.'s Exs. 9, 10, Esp., pp. 16, 31-33, 14.]

46. That six different inspections made by an official from the office of the United States Supervisor of the Harbor of New York in February, March and April, 1929, of garbage dumpings by New York City scows at the 8 and 12 mile dumping points, where the drift of the garbage was followed for periods of from 12 to 24 hours each, did not reveal a single occasion when the garbage reached any shore.

[S. M. 1944-1954; Pr. A. 636-639.]

47. That the garbage dumped on these occasions drifted, sometimes toward the New Jersey, and sometimes toward the Long Island shore, at the rate of about a mile an hour when the wind blew at the rate of 35 miles an hour, the direction and rate of the drift varying with the changes of the wind.

[S. M. 1944-1954; Pr. A. 636-639.]

48. That when dumped, the lighter portion of the garbage floats, while the heavier portion sinks, but that gradually some of that which first floated sinks, leaving a very considerably smaller portion floating at the end of 24 hours than at the time of dumping.

[S. M. 56, 153, 197, 1650-1653, 1657, 1863-1864-1957; Pr. A. 17, 40, 50, 549-550, 552, 617, 639.]

49. That The City of New York has not dumped garbage and refuse in the ocean for many years in any appreciable quantities within a marine league (three nautical miles) of the shores of the State of New Jersey, except on rare occasions either when necessary to preserve life where a scow was in danger of foundering, or when there is some unauthorized action on the part of individuals employed by the contractors in charge of the scows or tow boats.

[S. M., see References under 29-32, incl., above; also S. M. 1401, 1619, 1627, 1922; Pr. A. 466, 543, 630.]

50. That the territorial waters of the plaintiff do not extend more than one marine league or three nautical miles from the Atlantic Coast shore line of said State of New Jersey at low water mark.

[Comp. Stats. of New Jersey, see pp. 23-27 Deft.'s Brief.]

51. That the Atlantic Ocean dumping grounds used by the defendant in dumping its garbage as aforesaid are not within the territorial limits of the plaintiff.

[References under 50 above.]

52. That garbage and refuse dumped by the defendant into the Ocean as aforesaid has not found its way in any substantial quantities into the territorial waters or on to the beaches of the plaintiff.

[Evidence cited and reviewed in Deft.'s Brief, Point III, C-2 and C-4 (Part), pp. 44-56.]

53. That the Atlantic Ocean dumping grounds used by the defendant in dumping its garbage as aforesaid are not within the navigable waters of the United States.

[Deft.'s Brief, Point II, B. pp. 23-29.]

54. That the dumping of garbage and refuse at sea as aforesaid by the defendant has not caused substantial injury to the navigation of the ocean by the plaintiff or its citizens or visitors.

[See under 56.]

55. That the dumping of garbage and refuse at sea as aforesaid by the defendant has not caused any substantial injury to bathing or bathing rights or property connected therewith on the part of the plaintiff or any of its citizens or visitors.

[See under 56.]

56. That the dumping of garbage and refuse at sea as aforesaid by the defendant has not caused any substantial injury to fishing or fishing rights or property used in connection therewith of plaintiff or its citizens or visitors.

[See under 56.]

57. That the dumping of garbage and refuse at sea as aforesaid by the defendant has not substantially injured or menaced and does not substantially injure or menace the health safety, comfort or welfare of the State of New Jersey or of any of its citizens or visitors thereto.

[See under 56.]

58. That the dumping of garbage and refuse at sea as aforesaid by the defendant has not caused any substantial injury to the commerce of the plaintiff or its citizens.

[In respect to 53-58 inclusive, evidence cited and reviewed in Deft.'s Brief, pp. 63-66.]

59. That whatever garbage and refuse dumped into the ocean comes into the waters of the State of New Jersey and on to its beaches does so, for the most part, only when there is a high wind from the northeast, east or southeast.

[S. M. 289, 297, 480, 552-553, 709, 917, Pr. A. 72, 74, 133, 156, 215, 286.]

59a. That the prevailing winds along the coast of the plaintiff range from southwest to north, that is, they are off shore winds.

[S. M. 1670-1671, 1869, Pr. A. 557, 619.]

60. That the dumping of garbage and refuse at sea by defendant as aforesaid has not caused and does not cause any substantial depreciation to the value of the plaintiff's property or that of its citizens, has not retarded and does not retard the growth and economic development of plaintiff's territory and that of its municipalities in any substantial manner, and has not imposed and does not impose in any substantial manner upon plaintiff's municipalities and inhabitants, a constant or considerable expense in re-

moving defendant's garbage and refuse from public and private property.

[See under 58 above.]

61. That the size, summer population, property investments and assessed value of property of practically all of the New Jersey communities and municipalities located along the Atlantic Ocean shore front from Highlands to Seaside Park has increased greatly during the period from 1919 to 1929, during which the City of New York has been dumping a portion of its garbage and refuse into the Atlantic Ocean, as aforesaid.

[S. M. 229-240, 407, 459-460, 587, 599-600, 616-617, 695-696, 826-828, 878, 898, 905, 1178-1186, 1292, 1319, 1443-1445; Pr. A. 57-59, 109, 128, 168, 173, 180, 209, 255-256, 274, 280, 282, 377-381, 419, 428, 483-485.]

62. That although much more garbage and refuse, etc., has been dumped at sea by the City of New York during the summer months than during those of winter, the summer population of, and visitors to all of the New Jersey, Atlantic shore front communities and municipalities claimed by plaintiff to have been injured is and are many times greater than in the winter.

[S. M. 232-233, 418, 604, 610-611, 769-770, 822-823, 877-878, 896, 996, 1177, 1443; Pr. A. 58-59, 113, 174, 175, 236-237, 254, 273-274, 280, 313, 377, 483; Plff.'s Exs. 58-65; Deft.'s Ex. 12.]

63. That the dumping in the ocean by the defendant more than a marine league from the New Jersey coast at points 8, 12 and 20 miles southeast of Scotland Light Ship designated by the United States Supervisor of the Harbor of New York, and under conditions imposed by him, of

about 27% of the garbage collected by said City is not in fact an unreasonable disposition of its total garbage collections, pending the carrying out of its plans for the installation of additional incinerators.

[S. M. 1389- 1391, 1707-1725, 1795-1799; Deft.'s Ex. 12, Plff.'s Ex. 257; Pr. A. 458-459, 567-573, 592-594.]

64. That from 1896 to 1918 except for a few months in 1903, no New York City garbage and only a part of its refuse was dumped at sea, yet during that period a large amount of garbage and refuse was washed up into the New Jersey waters and on to its Atlantic shore front beaches.

[S. M. 1119, 1288, 1337, 1363, 1490-1491; Pr. A. 358, 417, 434, 444, 497, also S. M. 1706-1707; Pr. A. 566-567; Plff.'s Exs. 321, 322, 323.]

65. That the plaintiff failed to produce on the trial of this action any scientific or expert evidence as to the effect of ocean currents or tides upon the movement of objects dumped into the ocean at from 10 to 22 miles from the New Jersey shore and floating partially or wholly submerged in the ocean.

[See brief, Point III, C-4, pp. 56-58.]

66. That the deposit in substantial quantities in the Atlantic Ocean at points varying from 2½ to 8 miles from the Atlantic shore front of the plaintiff State, commencing with the minimum distance at Sandy Hook and extending to Barnegat Light House where the maximum distance existed, of garbage, refuse and cellar dirt (material taken from demolished buildings in New York City), by steamships and other floating equipment, and by scows of private contractors, of the same kind and character as that de-

posited in said ocean as aforesaid by defendant much further away from said shore front of the plaintiff, and the deposit of garbage and refuse in said ocean by the United States Navy Yard authorities at the points where defendant dumped, and the deposit in said ocean less than one-half mile from plaintiff's said shore front of insufficiently treated and unsanitary sewage from the Cities of Long Branch and Asbury Park makes it impossible to determine as a fact whether garbage and refuse and other offensive matter in substantial quantities is deposited by defendant in the waters of the State of New Jersey or on its beaches.

[Evidence cited in Defendant's Brief, Point III, C-4, pp. 56-61.]

Conclusions of Law.

(No references to the brief to support particular conclusions will be given.)

1. That the defendant, The City of New York, is a municipal corporation and a political subdivision of the State of New York administering governmental functions in the localities described in Sections 1 and 2 of Chapter 378 of the Laws of 1897 of the State of New York, as amended by Chapter 466 of the Laws of 1901 of said State and subdivided into five boroughs therein described.

2. That the Department of Street Cleaning and the Presidents of the Boroughs of Queens and Richmond of The City of New York for many years prior to and until December 1, 1929, and thereafter the Department of Sanitation thereof, had jurisdiction in said City over the removal and disposition as often as the public health

required of ashes, refuse, street sweepings and garbage in said City.

3. That the dumping in the Atlantic Ocean since the year 1918 of garbage and refuse of the defendant at points 8, 12 and 20 miles southeast of Scotland Light Ship and about 10, 12 and 22 miles respectively from the Atlantic shore of the State of New Jersey, or much more than one marine league from said shore and its waters was not and is not a nuisance *per se*.

4. That the dumping in the Atlantic Ocean by the defendant of garbage and refuse for many years last past at the points and distances from Scotland Light Ship and from the New Jersey shore as above mentioned was not and is not a dumping thereof in the navigable waters of the United States.

5. That the dumping in the Atlantic Ocean by the defendant of garbage and refuse for many years last past at the points and distances from Scotland Light Ship and from the New Jersey shore as above mentioned was not and is not a dumping thereof in the territorial waters of the State of New Jersey.

6. That the dumping in the Atlantic Ocean by the defendant of garbage and refuse for many years last past at the points and distances from Scotland Light Ship and from the New Jersey shore as above mentioned was a dumping thereof on and into the high seas.

7. That the dumping in the Atlantic Ocean by the defendant as aforesaid of garbage and refuse has not obstructed and does not obstruct or impede the navigation of the waters of the United States or of the State of New Jersey.

8. That the dumping in the Atlantic Ocean by the defendant as aforesaid of garbage and refuse has not injured or destroyed and does not injure or destroy the bathing or fishing rights or property therein of the plaintiff or of its citizens or visitors thereto.

9. That the dumping in the Atlantic Ocean by the defendant as aforesaid of garbage and refuse has not regulated or destroyed and does not regulate or destroy the commerce of the State of New Jersey and/or its citizens in violation of Article I, Section 8, Paragraph 3 of the Constitution of the United States or of any statute of the United States.

10. That the dumping in the Atlantic Ocean by the defendant as aforesaid of garbage and refuse has not taken and does not take any property or right of the plaintiff and/or its citizens without due process of law in violation of Article XIV, Section 1 of the Constitution of the United States.

11. That the dumping in the Atlantic Ocean by the defendant as aforesaid of garbage and refuse has not violated and does not violate Title 33, Chapter 9, Section 407 of the United States Code, approved June 30, 1926, nor any other statute or law of the United States.

12. That the dumping in the Atlantic Ocean by the defendant as aforesaid of garbage and refuse has not violated and does not violate Public Laws of New Jersey, 1882, page 155 (3 Compiled Statutes "Pilot's" Sec. 47, p. 3958), nor any other statute of the State of New Jersey.

13. That the dumping in the Atlantic Ocean by the defendant as aforesaid of garbage and refuse has not de-

prived and does not deprive the plaintiff and/or any of its citizens of the natural advantages of its or their position along the seashore contrary to the sovereign rights of said State as a member of the Union or of any such rights.

14. That the dumping in the Atlantic Ocean by the defendant as aforesaid of garbage and refuse under permit from and supervision of the government of the United States through its Supervisor of the Harbor of New York and in accordance with the provisions of Title 33, Chapter 9, Sections 441-451 inclusive, United States Code (Approved June 30, 1926), and preceding statutes on which founded, is a compliance with each and every regulation and statute of the United States relating to navigation, commerce and/or any other subject over which Congress has exercised the jurisdiction of the United States.

15. That by reason of the dumping in the Atlantic Ocean by the defendant of garbage and refuse at the places, in the manner and under the conditions aforesaid, no justiciable controversy between the plaintiff and defendant is presented over which the Supreme Court of the United States has authority, jurisdiction or control under Article III, Section 2 of the Constitution of the United States or any other Article of said Constitution or under any statute of the United States or under the common law.

16. That the dumping in the Atlantic Ocean by the defendant at the places and in the manner aforesaid of garbage and refuse has not been and is not an unreasonable disposition of the same as a matter of law.

17. That the dumping in the Atlantic Ocean by the defendant at the places and in the manner aforesaid of garbage and refuse has not created and does not create a

public nuisance as a matter of law in respect to the plaintiff and/or its citizens or visitors or a public nuisance which seriously impairs the usefulness, wholesomeness and safety of the waters, beaches and shorefront facilities of the plaintiff, or its citizens or damages the property of said plaintiff, its municipalities and other citizens or their health, safety and welfare.

18. That the plaintiff herein must prove its claims and case against the defendant herein by clear and convincing evidence.

19. That the plaintiff herein failed to prove by clear and convincing evidence that any substantial portion of the garbage and refuse which found its way into the waters of the State of New Jersey or on its shores or beaches was that which was dumped into the Atlantic Ocean by the defendant.

20. That by reason of the deposit in substantial quantities of garbage, refuse, cellar dirt and unsanitary sewage in the Atlantic Ocean by agencies other than the defendant at points much nearer the coast of plaintiff, or no further therefrom, than where deposits of garbage and refuse are made by the defendant in said ocean as aforesaid, it is impossible to determine whether such garbage and refuse deposited by defendant in said ocean off the coast of the plaintiff reaches its waters and beaches in substantial quantities, and therefore defendant is not liable to the plaintiff for the injuries alleged to have been suffered by the plaintiff, its citizens and visitors.

21. That the plaintiff has failed to prove facts sufficient to constitute a cause of action in equity for the relief demanded in the complaint or for any relief in equity whatever.

22. That the defendant is entitled to a dismissal of the complaint herein with costs to the defendant.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1930.

No. 17, Original.

STATE OF NEW JERSEY, *Plaintiff,*

—against—

THE CITY OF NEW YORK, *Defendant.*

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Plaintiff respectfully submits the following proposed findings of fact and conclusions of law, arranged in accordance with its brief.

PART I.

(pp. 1-6 of brief.)

General Findings of Fact.

1. This is an original action brought on behalf of the State of New Jersey by its Attorney General, pursuant to an act of the Legislature thereof in the form of a resolution approved April 16, 1929.

2. The complaint alleges that defendant disposes of its garbage and other refuse by dumping the same in the navigable waters of the United States off the coast of plaintiff, thereby creating a public nuisance in the waters and on the shore within the territorial limits of the plaintiff, and prays for an injunction to restrain the same.

General Conclusions of Law.

1. Plaintiff is a sovereign state of the Union charged with the duty of protecting its own waters and property and the property and rights of its municipalities and citizens.

2. Defendant is a municipal corporation in, and a citizen of, the State of New York.

3. A justiciable question is presented and this court has jurisdiction under Article 3, Section 2 of the Constitution and Title 28, Section 341 of the U. S. Code.

PART II.

(1)

Plaintiff has an interest as owner of the shore, between high and low water marks, and of the bed and waters of the marginal sea adjacent thereto, within its territorial limits.

(pp. 7-33 of brief.)

Findings of Fact.

1. From the boundary line between the States of New York and New Jersey at a point north of Sandy Hook, to Cape May, a distance of approximately 100 miles, the State of New Jersey borders on the Atlantic Ocean.

2. Said shore front from said boundary line to Beach Haven, a distance of more than fifty miles, is involved in this suit.

3. Defendant is proprietary owner of 285,055 lineal feet, or about 54 miles, of the shore or beach between high and low water marks, between Seabright and Beach Haven, along the section of the sea cost involved in this suit, together with the marginal sea adjacent thereto throughout the entire length of its eastern border.

Conclusions of Law.

1. Plaintiff has proprietary title to the shore, between high and low water marks, and to the bed and water of the marginal sea adjacent thereto within its territorial limits, which title it holds in trust for the benefit of its subjects, who are entitled to use such shore, bed and water for the purposes of navigation, fishing, bathing, sustenance and recreation.

2. Plaintiff's title thereto, and said rights of its subjects therein, are exclusive within the territorial limits of the plaintiff, subject only to the common right of navigation of others.

3. The marginal sea of plaintiff extends at least one marine league, or three nautical miles, seaward from a straight line drawn between Montauk Point and Cape May.

4. The places where defendant dumps its garbage and refuse are within the territorial limits of plaintiff.

5. Plaintiff has an interest as owner of the shore, between high and low water marks, and of the bed and waters of the marginal sea adjacent thereto, within its territorial limits.

PART III.

(2)

Plaintiff has an interest as parens patriae to protect the property, health and prosperity of its inhabitants.

(pp. 34-42 of brief.)

Finding of Fact.

Within the shore front involved in this case, in addition to the shore front between high and low water mark owned by the plaintiff, plaintiff's municipalities own 13,270 lineal feet and its citizens own 64,818 lineal feet thereof.

Conclusions of Law.

1. On behalf of such municipalities and citizens as have obtained grants from plaintiff for said shore property, and on behalf of all of the inhabitants of plaintiff, those residing in the twenty-nine municipalities involved, as well as those from other sections who use the sea and beaches for the purpose of fishing, boating, bathing and other forms of commerce or recreation, or who are engaged in enterprises dependent upon the patronage of those of plaintiff's inhabitants who reside in or frequent said municipalities for such purposes, plaintiff has an interest in this suit in the character of *parens patriae* as guardian and protector of the property, health and welfare of its inhabitants.

2. Plaintiff has an interest as *parens patriae* to protect the property, health and prosperity of its inhabitants.

PART IV.

(3)

Defendant has no legal right to dump garbage and refuse at sea.

(pp. 42-52 of brief.)

Findings of Fact.

1. Plaintiff denies the allegation of the dumping of garbage at sea and its answer sets up no justification or other defense.

2. The record shows that the defendant does dump daily large quantities of garbage at sea off the shore of plaintiff. At the hearings defendant claimed that such dumping was practiced under authority of permits of the Supervisor of the Harbor of New York, an agent of the War Department of the United States.

3. Except for the claim of authority under such permits, defendant shows no statutory or other legal right to dump its garbage and refuse at sea.

4. The record shows no authority to dump garbage at sea under the provisions of an act of Congress, approved March 3, 1889; 30 Stat. 1152, which forbids the discharge or deposit of any refuse material of any kind or description in any navigable waters of the United States, without a permit from the Secretary of War.

5. The record discloses no authority conferred upon defendant by plaintiff, or by any other authority, to dump its garbage at the places used for that purpose.

6. The dumping grounds used by the defendant are within the territorial limits of the plaintiff.

7. There is no proof of specific permits issued by the Supervisor of the Harbor for any particular scow or for any particular period of time.

Conclusions of Law.

1. The act of Congress, approved June 29, 1888; 25 Stat. 209, as amended by act of Congress, approved May 8, 1928; 35 Stat. 426, under which permits are claimed to have been issued by the Supervisor of the Harbor of New York, confers upon said Supervisor no plenary power to authorize the dumping of garbage at sea.

2. Plenary authority for such purposes can be obtained only by virtue of authority from the states.

3. The sole interest of Congress and the Secretary of War is the protection of navigation and to keep free from obstruction or impediment the ship channels which the War Department dredges and maintains at great expense for that purpose.

4. The dumping of garbage by defendant is in violation of a statute of the defendant being Chapter 118, Laws of New Jersey for 1882, p. 155.

5. The dumping of garbage within the territorial limits of the plaintiff is unlawful because it is done without the affirmative authority of plaintiff or of the United States.

6. Defendant has no legal right to dump garbage and refuse at sea.

PART V.

(4)

Dumping of garbage and refuse at sea by defendant creates a public nuisance upon the property and within the territorial limits of plaintiff.

(pp. 52-265 of brief.)

Findings of Fact.

1. For many years, continuously at least from 1915, defendant has dumped at sea some or all of its street sweepings, consisting of rubbish and light stuff, in spite of the persistent efforts of the Supervisor of the Port of New York to secure the adoption of some more sanitary and satisfactory method of disposition.

2. For some years prior to 1917, defendant's garbage was disposed of by cremation at Barren Island and on Staten Island. In July, 1917, the Barren Island plant burned. In November, 1918, the operation of the Staten Island plant was discontinued.

3. There is no explanation in the record of why the Barren Island plant was not rebuilt or why the operation of the Staten Island plant was not resumed.

4. Nothing appears of record to show that if the Barren Island plant was rebuilt and the operation of the

Staten Island plant resumed, defendant could not, with appropriate enlargement of these plants as increased demand for capacity arose, continue to dispose of its garbage and refuse in the manner employed prior to 1917, without dumping any thereof at sea.

5. Permits of the Supervisor of the Harbor for the dumping of defendant's garbage at sea were originally requested by the defendant's officials as a temporary measure to continue for two or three months only.

6. In order to avoid obstruction of the main ship channel entering New York Harbor, the Supervisor of the Harbor of New York has by permit designated the location of the dumping grounds southeast by east of Scotland Lightship varying in distance from said lightship from 8 to 20 nautical miles according to seasons of the year.

7. From August, 1917, to the present time defendant has dumped at sea large quantities of garbage and refuse amounting in 1925 to 1,517,934 cubic yards; in 1926, 1,303,119 cubic yards; in 1927, 1,219,416 cubic yards; in 1928, 1,378,572 cubic yards, and in 1929, 1,478,165 cubic yards.

8. Dumping of garbage and refuse at sea by defendant is disapproved by the War Department and by the Supervisor of the Harbor of New York, both of whom have frequently urged and admonished defendant to discontinue that practice because of washing of the garbage and refuse on shore and of the objectionable transportation thereof through the harbor.

9. The consensus of expert opinion expressed in the official reports of defendant and by the witnesses in this case is that dumping at sea is a highly objectionable practice; that at no matter what distance from shore garbage is dumped at sea, a considerable portion of it is apt to

wash up on the beaches; that the least harmful material sinks and the foulest floats, which through the action of current and wind is inevitably scattered along the beaches thereby creating a public nuisance; and that such a method of garbage disposal should not be resorted to except in emergency and for periods of short duration.

10. Certain parts of this garbage sinks and in many instances injures and destroys fishing tackle, lobster pots, lines and other equipment lawfully in use by citizens of the plaintiff and inflicts upon them many thousands of dollars in damages. Such part of the garbage and refuse as floats, either on the surface or in suspension in the water, finds its way to shore according to the direction of wind and currents, and the wind exercises a greater influence than the current. If the wind is blowing from the west or southwest this garbage accumulates on the beaches of Long Island and other shores to the eastward and northeastward of the dumping grounds. If the wind comes from the east, northeast or southeast such floating garbage and refuse accumulates upon the shores of the plaintiff at various points, according to the direction of the wind, between Seabright and Beach Haven, in varying quantities and over varying areas, according to the direction and velocity of the wind.

11. The subject of defendant's dumping of garbage at sea and its accumulation upon the beaches and in the adjacent waters of plaintiff has caused many complaints to, and numerous negotiations and correspondence with, the Mayor, Commissioner of Street Cleaning, Corporation Counsel and other officers of defendant, by the Governor of the plaintiff, the officers of many of its municipalities, the Secretary of War, and the Supervisor of New York Harbor, covering a period of at least ten years. During all of which time representations have been made to defendant's officers showing the creation of a public nuisance by the dumping of its garbage at sea and during all of which time

defendant's officers have promised to provide complete incineration for its garbage and refuse at various dates from 1925 down to the present time. In spite of those promises the record shows that during the past three years the amount of garbage dumped at sea has continuously and substantially increased and that the amounts dumped at sea in 1929 was 21.2% in excess of that dumped at sea in 1927.

12. Plaintiff is justified in refusing to rely upon defendant's promises to build incinerators and cease dumping at sea.

13. The garbage interferes with the United States Coast Guard service by obstructing the beaches and requiring the removal thereof before the lifeboats can be launched, and that the coast guards are required to spend considerable time removing the garbage from their beaches.

14. The garbage dumped by the defendant at sea creates an impediment and obstruction to the navigation of fishing boats, pleasure craft, lifeboats, and other craft, both with respect to launching and landing of boats on the shore and the operation thereof in the sea adjacent thereto within the territorial limits of plaintiff.

15. Garbage dumped by the defendant in the sea interrupts and impedes the fishing operations of plaintiff's subjects and injures and destroys fishing equipment, such as nets, lobster pots and the appurtenant tackle and gear.

16. Numerous citizens of the plaintiff have constructed and operate, under license from the Fish and Game Commission of plaintiff, duly authorized thereunto by statute of the Legislature of the plaintiff, fish pounds in which they have invested thousands of dollars for the purpose of taking fish from the waters within the territorial limits of plaintiff immediately adjacent to its shore. It appears from the evidence that such pound fisheries are profitable

enterprises and constitute a legitimate and useful exercise of the powers of the plaintiff and the privilege of its licensee.

17. Large quantities of fish, having great value, are caught annually in these fish pounds.

18. The net by which said pound fish are caught, are torn and destroyed and suffer damage to the extent of thousands of dollars a year by reason of the garbage and refuse from defendant's garbage dumps, which drifts in the sea with the wind and current, by reason whereof the nets are torn and destroyed and the fish therein are released to the loss of the owners of the pounds. Such floating garbage and refuse is foul and offensive and its presence drives away from said pounds fish that would otherwise swim in the waters where they are located.

19. Vast quantities of such garbage and refuse are cast upon the shores of the plaintiff in piles or windrows extending along the beach for a distance of many miles and frequently to a depth in excess of one foot. Said garbage and refuse contains broken household furniture, barrels, crates, boxes, boards, sticks, wearing apparel, household utensils, all kinds of vegetables, fruits, meats, sanitary articles of the most offensive character, dead fowls, dogs, cats and other domestic animals, and even bodies of infants. Two hundred and sixty-four different kinds of articles were identified and described and a complete list thereof was submitted as appendix "A" to the brief. In many instances the individual articles were identified by markings or other indications thereon as having come from the defendant city.

20. A large proportion of the vegetable and animal matter in the garbage washed upon the beaches is in a decayed and putrid condition, is foul smelling and nasty, is offensive to sight and that vast swarms of flies feed and breed therein; that the offensive odors of said matter

causes annoyance, discomfort and nausea not only to persons upon the beaches but also to persons on the streets and other public places and in their homes. In cases of high tides said garbage and refuse is washed into the public streets and upon private property. It contains boards with nails, broken glass and other material which on many occasions has caused physical injury to persons and animals, on the beach and in the public highways. Said garbage and refuse and the flies which it breeds constitutes a serious menace to the health, as well as the comfort and convenience of the plaintiff's inhabitants, and deprives them of the use and enjoyment of public and private property for extended periods of time.

21. The accumulation of said garbage and refuse in the water on the beaches and other public places is of such frequent occurrence as to constitute a substantial continuous public nuisance.

22. The shore front in question extends for a distance of more than 50 miles from Seabright to Beach Haven, and includes twenty-nine municipalities of plaintiff having an aggregate resident population of over 160,000, and private property assessed for the year 1929 at $139,599,-751.00, including hotels, boarding houses, private homes, places of business, etc. Said municipalities are seashore resorts inhabited and maintained for the benefit of, and frequented by, thousands of visitors during the summer season, solely on account of the attraction of the sea and the beach, for fishing, boating, bathing and other commercial and recreational purposes.

23. For the protection and improvement of the beaches and for the erection of boardwalks, pavilions, jetties, piers, pools and other bathing facilities, and other public improvements, designed and constructed solely for the benefit of the inhabitants and summer visitors, plaintiff and its municipalities and citizens have expended more than

fourteen million dollars. Other similar projects planned or in the course of construction represent an additional cost of approximately thirty million dollars.

24. Plaintiff's shore front in question constitutes one of the greatest natural advantages of the state. It is resorted to each year by many thousands of its citizens and by those of other states, for health, comfort and recreation in the enjoyment of the beaches and of the waters adjacent thereto for bathing, boating, fishing and other beneficial purposes.

25. The health, happiness and prosperity of vast numbers of plaintiff's inhabitants depend upon the commerce and pleasure derived from the use of said marginal sea and seashore and all of said pursuits including commercial fishing, pleasure boating, bathing and other uses of the water and shore, depend upon maintaining said waters and seashore free from the pollution and contamination which will interfere with such uses thereof.

27. It appears from the evidence that the contact of bathers with the garbage in the ocean has produced numerous diseases and infections of the ear and sinus such as furunculosi, exterior otitis and infections of the middle ear and reddening of the ear drums, which requires the ear drums to be opened, and numerous cases of infection of the skin.

28. Said garbage and refuse on the beaches and adjacent waters of plaintiff and the offensive appearance and odor thereof have produced nausea, discomfort and sickness.

29. Said accumulation of garbage and refuse on the shore and in the waters of the plaintiff creates an annoyance and inconvenience which materially interferes with

the ordinary comfort of the human existence and diminishes the value, comfort and enjoyment of the property of the plaintiff and its subjects.

30. The dumping of defendant's garbage at sea—

(a) Impedes and obstructs the free navigation of plaintiff's waters.

(b) Injures and obstructs the free and licensed fisheries of plaintiff's subjects.

(c) Hinders, and at times destroys, the public enjoyment of plaintiff's beaches.

(d) Pollutes the public waters, beaches, streets and other public places of plaintiff and its municipalities.

(e) Pollutes the atmosphere of the public places of plaintiff and its municipalities, and the homes of their inhabitants.

(f) Menaces the life and health of plaintiff's subjects.

(g) Retards the growth and economic development of plaintiff's territory and municipalities.

(h) Depreciates the value of the property and property rights of plaintiff and its subjects.

(i) Injures the general welfare of plaintiff's inhabitants.

(j) Imposes upon plaintiff's municipalities and inhabitants a constant and considerable expense in removing defendant's garbage and refuse from public and private property.

(k) Produces an intolerable annoyance and interference in the enjoyment of the health, comfort and property of plaintiff's inhabitants.

(l) Feeds and breeds vast swarms of flies which are a menace to life and health by reason of their annoyance and disease-carrying power.

31. The garbage and refuse of which plaintiff complains does not come from passing ships.

32. The garbage and refuse dumped into the sea by passing vessels is inconsequential and harmless and it does not contribute to the conditions of which plaintiff complains.

33. There is no proof of other scows dumping garbage or refuse off the coast of the plaintiff.

34. There is no competent proof that the Long Branch Sewer empties any sewage in the ocean.

35. There is no proof that any sewage discharged from the Long Branch Sewer Company's plant pollutes or tends to pollute the Atlantic Ocean.

36. There is no proof of any solids being discharged into the ocean from any outlet of the Long Branch Sewer system.

37. There is no proof of any nuisance being committed by the discharge into the ocean of the effluent of the sewers at Asbury Park or Long Branch.

38. It appears from the record that the complaints respecting Long Branch Sewer Company's system in September, 1926, have been met by plans submitted on that day to and approved by the State Board of Health of plaintiff. There is no proof that those plans have not been carried out to the satisfaction of the Department of Health of plaintiff.

39. There is no record of any complaints or of any criticisms of the sewer system by the State Department of Health or by any other official authority since that time.

40. Plaintiff is not bound by any statements contained in Exhibit No. 10.

41. The only evidence in the record of the discharge of any solids, or sewage effluent of a character such as to pollute or tend to pollute the waters of the Atlantic Ocean at Asbury Park is contained in defendant's Exhibit No. 11

which is a bill of complaint filed in the New Jersey Court of Chancery in an action by the State Department of Health against that city. The allegations of that complaint are denied by the answer of the City of Asbury Park, filed December 30, 1930. Whether those allegations are true or not are to be demonstrated at a hearing of the case on the merits.

42. The cause of action stated in defendant's Exhibit No. 11 arose after the hearings in this case had closed and therefore have no relevancy to the subject-matter of this suit.

43. The resolution (a) which is part of defendant's Exhibit No. 9 and defendant's Exhibit No. 11 shows that plaintiff is diligent in its efforts to prevent the pollution of waters and shore within its territorial limits.

44. A substantial part, if not all, of the garbage accumulation upon plaintiff's shore and in its waters is carried by wind or tide from the dumping grounds where the scows of defendant are emptied and defendant's dumping of garbage at sea causes a greater portion, if not all, of the nuisance complained of.

45. The accumulation of garbage and refuse in the waters and on the shore constitutes a public nuisance.

Conclusions of Law.

1. The primary uses of the sea are navigation and fisheries.

2. The right of fishery within one marine mile of the shore rests exclusively in the people of the adjacent state.

3. The free use of the ocean for navigation and fishing is common to all mankind.

4. The most valuable perequisite of the exclusive ownership of the marginal sea is the benefit of fisheries therein.

5. An obstruction to navigation is anything that causes an impediment rendering navigation less convenient, less secure or less expeditious and includes the deposit of debris in the water.

6 By the common law of England the right of property in the waters of the marginal sea are in the Crown, subject to the common right of navigation and fisheries, which is the common birthright of the people. The common law rule of sovereign proprietorship and public rights was adopted and is now in force within the territorial limits of the plaintiff.

7. The exclusive proprietary rights of the sovereign and the exclusive right of fishery of its subjects extend from the ordinary high-water mark on the shore to the extreme limit of the marginal sea. The common rights of navigation extend over all navigable waters. The common right of fishery which belongs to all mankind of all nations, extends to all parts of the high seas beyond the exterior limits of the marginal sea.

8. Plaintiff's citizens have an exclusive right of fishery in the waters within the territorial limits of plaintiff, and the right of unimpeded and unobstructed navigation not only on the waters within the plaintiff's territorial limits, but also on the high seas outside of those limits.

9. Bathing in the ocean is a public right which the plaintiff's inhabitants are entitled to enjoy without interruption or interference.

10. Plaintiff has a right to protect the rights of its citizens within its own territorial waters regardless of the power of Federal Government in the interest of navigation.

11. No measure of necessity, usefulness or public benefit will protect defendant from the condemnation of the law of a public nuisance. Defendant must find a way at

its peril. If it lacks legislative authority it must acquire it. If constitutional amendment are necessary it must obtain them.

12. Pure air and the comfortable enjoyment of property are as much rights belonging to it as the right of possession and occupancy.

13. Garbage dumped by defendant at sea, at whatever distance from plaintiff's shore, if carried thither by winds, tides or other natural agencies, constitutes a public nuisance in the same manner as if it were dumped directly upon the shore or immediately adjacent waters of the plaintiff.

14. The defendant having liberated the garbage in the sea is responsible for the results of the action of such natural agencies as wind and tide in carrying the same to the shores of plaintiff.

15. Municipalities situated upon or adjacent to the ocean have a legal right to discharge their sewage therein, so long as they do not commit a nuisance thereby.

16. The discharge of sewage by plaintiff's municipalities into the Atlantic Ocean is not a nuisance *per se*. The burden of proof to establish a nuisance therefrom is upon the defendant and no such proof was offered.

17. Contribution by others to the nuisance complained of neither justifies nor excuses the defendant.

18. Dumping of garbage and refuse at sea by defendant creates a public nuisance upon the property and within the territorial limits of plaintiff.

PART VI.

(5)

Dumping garbage and refuse at sea by defendant constitutes a trespass upon the property of plaintiff.

(pp. 265-271 of brief.)

Finding of Fact.

1. The dumping grounds used by defendant for the disposal of its garbage are within the territorial limits of the plaintiff.

Conclusions of Law.

1. The daily dumping of garbage by defendant within the territorial limits of the plaintiff constitutes a continuous trespass upon the property of plaintiff.

2. Dumping garbage and refuse at sea by defendant constitutes a trespass upon the property of the plaintiff.

3. Plaintiff is entitled to relief by injunction to restrain the continuance of said trespass.

PART VII.

(6)

Injunction is the only adequate and proper remedy in the premises.

(pp. 271-292 of brief.)

Findings of Fact.

1. The acts of defendant complained of continue from day to day and create a public nuisance which causes irreparable injury to the property and rights of the plaintiff and its citizens.

2. There is no adequate remedy of law in the premises, since a judgment in law would deal only with the past and would provide no remedy against the future recurrence of the nuisance. The situation involves a multiplicity of suits.

3. Many of the elements of damage such as odors, annoyance, unhealthful conditions, and deprivation of the use of the shore and waters are incapable of measurement by any monetary standard.

4. The acts of defendant complained of constitute a public nuisance upon the property of the plaintiff and its citizens which results in irreparable damage and injury.

5. An injunction should issue as a natural course, whether the injury is large or small.

Conclusions of Law.

1. The rule of prescription or laches have no application to a public nuisance. Each day's continuance is a new offense.

2. Plaintiff is more certainly entitled to expect relief than a private party might be, or as would be the case where the Court is asked to control the conduct of one State at the suit of another.

3. Injunction is the only adequate and proper remedy in the premises.

PART VIII.

Final Conclusion of Law.

Plaintiff is entitled to relief by injunction according to the prayer of the complaint.

Respectfully submitted,

WILLIAM A. STEVENS,
Attorney General.

DU..NE E. MINARD,
Assistant Attorney General,
Solicitors of Plaintiff.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 18, Original

STATE OF NEW JERSEY, *Plaintiff*,

vs.

THE CITY OF NEW YORK, *Defendant*.

REPORT OF THE SPECIAL MASTER.

To the Supreme Court of the United States:

In the above entitle cause this Honorable Court appointed me as Special Master by its order dated October 14, 1929, as follows:

"And it is further ordered that the Honorable Edward K. Campbell be and he is hereby appointed Special Master in this cause with power to summon witnesses, issue subpoenas and to take such testimony as may be introduced and such as he may desire to call. The master is directed to make findings of fact and conclusions of law and to submit the same to this Court with all convenient speed, together with his recommendations for a decree. The findings, conclusions and recommendations of the master shall be subject to consideration, revision or approval by the Court."

The parties to the suit, by their respective counsel, appeared before me in Washington, in compliance with my request, in November, 1929, when a time was fixed for the taking of proof. Public hearings began at Asbury Park, New Jersey, on December 11, 1929, continuing for three

days. Another public hearing was held at Asbury Park on January 15, 16, and 17, 1930; and another at the same place on January 22, 23 and 24, 1930. At these hearings more than one hundred and fifty witnesses for the plaintiff were examined.

Public hearings were resumed in the City of New York on March 24, 1930, and continued through March 27, 1930. On April 8, 1930, a public hearing was had at Newark, New Jersey, when witnesses were examined.

Another public hearing was held at Washington, D. C., on December 5, 1930, and some additional proof was admitted without objection. At that time at the request of counsel and to afford time for preparation for argument and briefs the Special Master set February 4, 1931, as the date upon which arguments would be heard, and on the last named date counsel were heard in oral argument. The motion to amend the answer was then pending.

Except to call upon the defendant to file a statement from its records showing the quantities of garbage and refuse dumped at sea for each of the years 1925 to 1929, both inclusive, I did not deem it necessary to call other witnesses.

Now pursuant to the above-mentioned order I have reported the testimony and the exhibits received by me as Special Master, by filing the same in the office of the Clerk of this Court with my certificate, and I herewith submit to the Court my findings of fact, conclusions of law and recommendations.

Respectfully submitted,

EDWARD K. CAMPBELL,
Special Master.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1930.

No. 18, Original.

STATE OF NEW JERSEY, *Plaintiff*,
vs.
THE CITY OF NEW YORK, *Defendant*.

REPORT OF THE SPECIAL MASTER.

PLEADINGS.

The Bill.

The State of New Jersey exhibited its original bill in the Supreme Court of the United States against the City of New York, a municipal corporation under the laws of the State of New York, by which the State seeks an injunction restraining the City, its contractors and agents from dumping garbage or refuse into the waters of the Atlantic ocean off the coast of New Jersey and from defiling the waters and polluting the beaches of said State.

(1) The Court's jurisdiction is alleged to depend upon the ground that the suit is one in which a state is a party within the provisions of Article III, Section 2 of the Constitution of the United States.

(2) The Bill describing the location of the State as bordering on the Atlantic Ocean for more than one hundred miles alleges that the portion of ocean frontage more directly affected by the matters complained of extends from Atlantic Highlands to Beach Haven, a distance of approximately fifty miles, occupied by a continuous succession of municipalities which because of their beaches are adapted to, and their inhabitants are engaged in and rely for their livelihood chiefly upon, the business of maintaining sum-

mer resorts to which great numbers of people come in the pursuit of rest, recreation and pleasure.

(3) It is alleged that the plaintiff possesses the sovereign ownership of the lands along the shore and under the waters of the ocean below highwater mark throughout its beach front within its territorial limits and that the use of the said beaches and the adjacent waters are common to the people of the State.

(4) That said seashore is famous as a summer resort and has been greatly improved by piers, wharves, pavilions, bathing beaches and other conveniences for the health and recreation for citizens of the State and other people resorting to these places and that along the seashore and for some miles landward the territory is improved by hotels, pleasure resorts, country clubs, residences and large estates which are provided and maintained at great expense for the benefit of summer visitors and residents. That the waters of the ocean adjacent to the said shore and beaches are largely used for surf-bathing and for pleasure boating, for fishing and other purposes, and that many millions of dollars have been invested within the beach section in hotels, bathing pavilions, piers for landing and for pleasure, boardwalks, boulevards and facilities for pleasure and profit, and that several thousands of people are constantly employed to maintain and operate the same.

(5) That the section in question lies between the two great metropolitan areas of New York and Philadelphia and within easy access and communting distance by rail or motor vehicle of people within these areas; that many persons commute daily between the seashore and their places of business, and the seashore is visited by many thousands of visitors and excursionists during summer months and over holidays and week ends.

(6) That the growth, prosperity and substantial property values of the seashore communities in question are the result of enterprises dependent upon the population and the suitability of said waters, beaches and shore front fa-

cilities for fishing, boating, bathing and other seashore recreations and pursuits, and that the continuance of these agencies depends primarily upon the ability of the State or its citizens and municipalities to keep the waters wholesome and the beaches and sea front property free from pollution, contamination, and unsightly and unhealthful conditions.

(7) That along the beach section in question are located many fish pounds, constructed under licenses granted by the State or one of its departments and maintained by its citizens who have made investments in the fishing business of large sums of money; that the production of these fish pounds in one year amounts to approximately 20,000,000 pounds of fish, having a value of nearly a million dollars, and that the industry gives employment to approximately 500 men.

(8) It is alleged that the defendant, with a population exceeding 6,000,000 of people and increasing annually, disposes of garbage and other refuse by transporting the same in barges towed out and dumped into the navigable waters of the United States off the complainant's coast and that many barge loads are so disposed of daily and may constantly increase. The Bill specifies a number of articles and things composing the garbage and refuse, much of which, it is averred, is in a putrid and decayed condition. It is alleged that a considerable proportion of said garbage and refuse floats upon and beneath the surface of the sea in masses or islands which obstruct and impede fishing boats and other craft until it is driven by the wind and tide upon the said beaches and cast thereon by waves in heaps and windrows and under or about the piers, wharves, adjacent boulevards and private property, where it decays and pollutes the sea and land unless and until removed and disposed of by the municipality or citizens. That this removal or disposition from the beaches and places affected requires large expenditures by the municipality and other large sums by citizens of the State.

That said garbage or refuse in the water and cast upon the beaches and property of complianant and its citizens is poisonous and otherwise injurious to human beings and to the fish and other forms of marine life; that it impedes the open navigation of the Waters of the United States clogs, tears and injures the net of the fish pounds, and renders the waters noxious, offensive and unfit for fishing, boating or bathing, and that the dumping of garbage and refuse by the defendant creates a public nuisance which seriously impairs the usefulness, wholesomeness and safety of said waters, beaches and short-front facilities and of the property of the plaintiff, of the municipalities and its citizens, and thereby greatly damages the property, seriously menaces the health and safety of the plaintiff and its citizens; that said acts are and will be repeated and continued from day to day, and that the plaintiff is without adequate remedy at law.

(9) It is further averred that the acts complained of—

(a) Take the property of complainant and its citizens without due process of law in violation of Article XIV, Section 1 of the Constitution;

(b) Regulate and destroy the commerce of the plaintiff and its citizens in violation of Article I, Section 8, paragraph 3 of the Constitution;

(c) Deprive plaintiff and its citizens of the natural advantages of their property along the seashore contrary to its sovereign rights as a member of the Union, and,

(d) It violates Title 33, Chapter IX, Section 407 of the United States Code and other laws of the United States and that said acts are otherwise detrimental to the interests of the plaintiff and its citizens.

ANSWER.

The answer of the City of New York, except in its admission of the averments as to its own population, was substantially a general denial of the allegations of the Bill.

Issue was joined upon this answer.

After the testimony was concluded and the day had been fixed for argument before the Master, the defendant on, to wit, February 2, 1931, filed its motion in this Court for leave to file its amended answer. This motion was allowed by the Court on February 24, 1931, by an order reading as follows:

"The motion of the defendant for leave to file an amended answer and to withdraw the answer heretofore filed in this cause is granted; provided that the plaintiff's reply to the original answer may, if desired, be deemed the reply to the amended answer and that all proceedings heretofore taken herein shall stand and shall be regarded as having been taken as if the amended answer had been originally filed and without reopening the evidence."

AMENDED ANSWER.

The answer denies many of the avertments of the bill, and not admitting others sets forth "for a first defense":

(1) That the defendant has for many years last past dumped the garbage and some refuse collected by it in the Atlantic Ocean, under the supervision of the Supervisor of the Harbor of New York and in accordance with and only after the issuance of permits by said Supervisor under the authority conferred on him by the Act of June 29, 1888 (25 Stat. 209), as amended, and now Title 33, Secs. 441, 443, 449 and 451 of the U. S. Code) "at points eight, twelve, and twenty miles southeast of Scotland Light Ship and about ten, twelve and a half and twenty-two miles distant respectively from New Jersey shore (being greatly in excess of one marine league from said shore) and not within the navigable waters of said State of New Jersey or of the United States; that in view of the dumping of said garbage and said refuse on the high seas by the said City of New York in the manner and at the points aforesaid this Court has no authority to enjoin the said city, the defendant herein, from said dumping of garbage or refuse so performed."

(2) And further answering and "for a second defense" the defendant alleges: "6. That garbage and refuse in large quantities," including various materials set forth in the answer, "has for many years last past been and are being dumped into the Atlantic Ocean from steamships and other floating equipment, both inside and outside of the entrance to New York harbor and into the sea lanes for vessels clearing for ports south of New York and returning therefrom at distances from two-and a half to eight miles from the shore of New Jersey, from Highlands to Barnegat Lighthouse," and that great quantities of condemned food stuffs are and have been for many years dumped at sea at a point about twenty-five miles southeast of Scotland Lightship, and that private contractors have, for many year last past, dumped, under permits issued by the Supervisor of the Harbor of New York under said statute, into the Atlantic ocean at points from three to eight miles southeast of Scotland Lightship, "excavated and refuse materials from demolished buildings in the City of New York, which materials often contain large quantities of refuse, and other things mentioned; and that such private contractors and the United States Navy Yard have for many years been dumping garbage into said ocean either at points from eight to twenty miles distant from said Scotland Lightship or nearer thereto under such permits issued by the Supervisor of the Harbor of New York; and further that insufficiently treated and unsanitary sewage from the cities of Long Branch and Asbury Park for a number of years last past has been and is being discharged into the Atlantic ocean at short distances from the beaches of each of those cities; and that all of the garbage, refuse and sewage and offensive matter is the same kind and character as that dumped by the City of New York at points eight to twenty miles southeast of Scotland Lightship and from ten to twenty-two miles from New Jersey shores. That "such garbage, refuse, sewage and other offensive matter discharged as aforesaid by private contractors, by

the United States Navy Yard authorities and by said New Jersey cities into the water of the Atlantic ocean in large quantities would float under the influence of the tide and wind into the water and on to the beaches of the State of New Jersey and its municipalities claimed to be polluted in this action" and "it is impossible to determine whether garbage or offensive materials in substantial quantity dumped by the City of New York is deposited in the waters of New Jersey and on its beaches or in greater quantities than that deposited in the sea by other agencies than the City of New York; and that if any injuries or damages are suffered by New Jersey or its citizens or to their health, safety or property it is not chargeable to the acts of the defendant: and

(3) "For a third defense the defendant alleges that the bill of complaint does not state facts sufficient to constitute a cause of action or to entitle the plaintiff to any relief."

PARTIES AND JURISDICTION.

This is an original action brought by the State of New Jersey under authority of a resolution of its Legislature, approved April 16, 1929, by direction of the Governor of the State.

The defendant is the City of New York, a domestic municipal corporation, created by and existing under the laws of the State of New York.

The case presents a justiciable controversy over which this Court has jurisdiction. (Art. III, Sec. 2, Const. of the U. S.) (*Georgia* v. *Tennessee Copper Company*, 206 U. S. 230; *Missouri* v. *Illinois*, 180 U. S. 208; 200 U. S. 496. *New York* v. *New Jersey*, 256 U. S. 296; *Wisconsin* v. *Illinois*, 278 U. S. 367, 418).

FINDINGS OF FACT.

The facts deemed to be established by the evidence and which may be considered material to the contentions of the

parties relative to the locality and area affected, summer resorts and beaches, fishing and boating; garbage conditions and effects thereof on the beaches, and their removal, effect on surf bathing and the frequency of garbage deposits and cause thereof; also some history of the dumping by defendant of garbage and refuse, at sea, and reports by the Supervisor of the Harbor of New York, the quantities of garbage or refuse dumped, their movements, also relative to complaints of conditions caused by the deposits, and to matters alleged by defendant in defense; and some other matters hereafter noted are as follows:

GENERAL STATEMENT.

(1) Locality.

The State of New Jersey on its easterly side borders on the Atlantic Ocean for a distance of about one hundred miles. A reduced copy of a map in evidence, showing the geographical location, is made an exhibit to the bill.

(2) Area Affected.

(a) The part of the State affected more directly by the matters complained of is that portion of the ocean frontage extending from a point at or near Atlantic Highlands southward to Beach Haven, a distance of approximately fifty miles and inward from the shore at various distances. Within this fifty miles of ocean frontage there are twenty-nine separate municipalities of the State.

(b) The State of New Jersey, as the proprietary owner of the seashore, has at different times conveyed to these several municipalities, and in some instances by lease or otherwise, to individuals designated, portions of the frontage under water. No material changes have occurred since 1928 and in that year the ownership of the frontage under water along the said fifty miles of coast line was as follows:

The State owns approximately 285,000 lineal feet be-

tween Sea Bright and Beach Haven; the municipalities, approximately 13,000 lineal feet, and private parties approximately 64,000 lineal feet.

The aggregate resident population of these municipalities exceeds 160,000. Their summer visitors exceed this number many times over. For instance, Allenhurst, a residential place, has a winter population of 1,000, and a summer population of 3,000. Bayhead has a winter population of 300 and a summer population of some 6,000 or 8,000; Bradley Beach (winter), 5000, (summer), 30,000 to 40,000; Ocean Grove (winter), 4,000, (summer), 35,000 to 40,000. The figures given are approximated. Other municipalities show about the same general ratio between their winter and summer populations.

The assessed value of property within said 29 municipalities for state tax purposes for the year 1929, including hotels, boarding houses, private houses and places of business, exceeded $139,000,000.

(3) Summer Resorts.

These municipalities are seashore resorts, inhabited and maintained as such for the benefit of residents and visitors. Many thousands of visitors frequent them during the summer season solely on account of the benefits and the attractions of the sea and the beach for fishing, boating, bathing and other recreational purposes. There are visitors to some of them at other seasons of the year than the summer who go there for the benefits afforded by the ocean and air.

(4) Beaches.

(a) The beaches along said frontage afford natural advantages for seashore resorts and from an early date have been well and favorably known and patronized as such. To these natural advantages have been added many

improvements for their protection and improvement, in the erection of jetties and piers, board walks and pavilions, pools and bathing facilities, ocean front casinos, and amusement facilities designed and constructed for the use and enjoyment of residents and visitors. Upon these the State and the municipalities and citizens have expended more than $14,000,000. Other projects already planned call for additional large expenditures of money. These beaches are within easy access of people residing in the metropolitan areas of New York and Philadelphia, and conveniences of travel to them are supplied by railroads, good roads, motor cars and busses. They are accordingly visited by people from these areas in great numbers as well as by people from other parts of the United States and from abroad and from all parts of New Jersey. A record kept of the ntumber of people brought by excursions run by two railroads entering Asbury Park, during a period of years shows that in 1924 there were more than 256,000, and in 1929 more than 160,000. Its resident population is about 20,000.

The inhabitants of these municipalities depend for their livelihood chiefly upon the business of maintaining summer resorts. The ocean, with its uses and suitableness for bathng, for fishing and boating is the chief attraction which they can offer visitors. People congregate at them in numbers in the pursuit of rest, recreation, health and pleasure. Clean beaches are of the utmost importance to the comfort of visitors and the prosperity of residents at these resorts.

A large number of photographs were introduced and filed as exhibits, showing the crowded condition of beaches by people assembled there to take part in or witness the bathing and enjoy the beaches and ocean.

There are many private homes in the several towns and boroughs. In many of these the owners reside during the summer and commute to their places of business in New York, Philadelphia or some place in New Jersey.

(80)

(5) Fishing.

(a) The statutes of New Jersey provide for a license to be issued by its Board of Fish and Game Commissioners upon due application therefor for the taking of fish by means of fish pound nets, and make it unlawful to erect and maintan fish pound nets in any of the waters of the Atlantic Ocean "within three nautical miles from the coast line" without first having procured such license (N. J. P. L. 1919, page 214). Numerous citizens have constructed and operated such "fish pounds" under licenses within the prescribed area adjacent to the shore and have invested many thousands of dollars in the business of taking fish. The conduct or operation of these fish pounds and the handling of the catch gives employment to approximately 500 persons.

The fish pound nets are extended from a point about a quarter of mile from shore outward for a distance of approximately 1500 feet, in water from twenty to thirty-five feet deep, are supported by poles driven in the bottom, the pounds or traps being at the outer end. When fish feeding along the coast come in contact with the net, which serves as a wier, they turn toward deeper water, following the net and the contraption is such that the fish are finally led into the trap from which they cannot extricate themselves and from which they are taken.

More than one hundred of these fish pounds are located at divers places off the coast of plaintiff and large quantities of fish are taken annually and sold from them. The value of the fish pounds in 1928 was approximately $700,000. The fish caught amounted to approximately 25,000,000 pounds and sold for approximately $950,000. Less fish were taken in 1928 than in 1924, 1925 or 1926, but more in 1928 than in 1927.

(b) Fishing as a sport is engaged in by many persons using boats or the piers or the shore from which to cast their lines and furnishes an attractive feature of these resorts.

(6) Bathing.

(a) One of the most favored uses of said ocean front is the surf bathing. Visitors and residents are attracted by the same and when the water is not unsuitable use and enjoy surf bathing in great numbers. The continued attractiveness of the resorts depends on the water along the shore being wholesome and suitable for the purposes of summer resorts and the beaches free from pollution and unsightly or unhealthful conditions.

(7) Garbage.

Vast quantities of garbage and refuse are stranded on the beaches in question, cast thereon from and by the waters of the ocean and extending in piles and windrows along the same. The general constituents of these deposits of garbage and refuse are:

(1) Garbage of all kinds, including vegetables, such as cabbage, kale, potatoes, onions, peppers, greens, tomatoes, turnips, and other kinds; and fruits, such as oranges and grapefruit and the skins and parts of either; and melon rinds, banana skins, apples and other kinds, besides bread and pieces of meat large and small and remnants from the kitchen; and many of these when cast upon the beach are in advanced stages of decay and rottenness.

(2) Intermixed with the foregoing is frequently found a soft and grease-like matter that settles on the beach and renders passage thereon extremely disagreeable because it adheres to the feet and is odorous.

(3) Large numbers of electric light bulbs and pieces thereof; glass bottles, whole or broken.

(4) Dead dogs, dead cats and dead fowls.

(5) Pieces of wood; crates and parts of crates, bundles of paper; broken furniture; rags, cans and rubbish.

The foregoing is not an enumeration of all of the different things found in the deposits. There were introduced in evidence a great variety of things that had been found at different times upon the beaches amongst the general mass of deposits. The number of these things exceed 250 kinds. Included in these and bearing the names and addresses of business houses and concerns in New York City are such things as billheads, business cards and letterheads; paper cartons and labels, bulletins and cancelled checks; hundreds of sale slips and order and charge slips; large bundle of letters to a New York City concern; a number of "examination papers" in a college in New York City; innumerable milk bottle caps with names thereon of one or another dealer in New York City; laundry tickets, theatre tickets, restaurant tickets and menu cards; papers in large bundles; crates and paper boxes, all containing New York City addresses. A bundle of 46 letters, postmarked City of New York, dated in December, all addressed to one family in New York City.

This conglomeration is spread over and upon the beaches from high-water mark to low-water mark, littering the entire beach, and while at different beaches there frequently appears a variety such as more of the wooden things, driftwood and so forth, the general mass appears at all of the beaches affected by the particular deposit. The deposits extend long distances along the shores, sometimes in unbroken lengths of more than twenty miles and at other times is limited to the length of three or four or more of the beach fronts. At times the mass does not stop at high-water mark but is cast by the force of the waves under the boardwalks and into the street beyond. Frequently the depth of the mass exceeds one foot.

When the garbage and refuse are cast upon the beaches they must be speedily removed, especially in summer. The conglomeration of things spoken of and referred to give off offensive odors and when subjected to the sun's rays in-

crease in offensiveness and foul smelling that reach away from the shore to the streets and into the homes of the people. Swarms of flies appear on the mass and feed there. The offensive odors from these deposits cause annoyance and discomfort and nausea. They are unsightly on the beaches. Large proportions of the animal and vegetable matter forming a part of the conglomeration and being in the putrid or decaying condition must be disposed of hurriedly and are buried. Other parts are hauled away. At times it requires fifty or more truck loads to remove one deposit from a single beach. The grease-like matter is removed by rakes. The deposits of garbage and refuse pollute the beaches and produce unhealthful conditions, interfering with and frequently preventing the comfortable and enjoyable use of the beaches and the sea. It is dangerous to leave children unattended on the beach while the deposits are there because of things they may pick up; some of the things found being unmentionable. Broken glass and nails in pieces of wood have been the cause of severe wounds to persons on the beach or in bathing. The appearance and condition of the conglomeration is aptly described by witnesses as "nasty" and "filthy." It is a menace to health and tends to injure business and property values. It injures rental values. They have been made the subject of many complaints as hereafter stated.

During June, July and August, 1929, there were in Asbury Park a considerable increase over the preceding year of cases of external otitis which is a swelling or inflamation of the ear canal and of cases of infection of the middle ear, requiring the drum to be opened, and of sinus affected cases, resulting from bathing in the ocean.

Pure sea water has a high chlorine content and is quite antiseptic. Infection is contrary to the natural conditions of sea water. One or more of the Coast Guard incurred a skin infection from the water which gave them considerable trouble.

(8) Removal and Expense.

Each deposit of garbage and refuse imposes upon the municipalities affected the expense incident to its removal. Men are regularly employed to perform that duty. The cost of cleaning the beaches following such deposits at Bayhead amounted, in 1929, to $3,000; at Belmar, $2,000; at Bradley Beach, for 1928 and 1929, it exceeded $3,500; at Deal, from $1,000 to $1,500 per year; at Allenhurst, $1,000 per year; at Ocean Grove an average of approximately $275 in four years; at Seaside Park, $600 per year; at Seaside Heights, $500 per year; at Spring Lake, $300 per storm, and in 1929, $700 as the expense of one removal; and various sums at the other places, some in excess of those stated.

(9) Water and Fish Nets.

When the garbage and refuse have been cast upon the shores, as stated, it generally occurs that the water along the shore line continues to hold in suspension large quantities of the same kind of material which renders bathing therein undesirable and impracticable until the water and its undertow can carry these things away. The objectionable materials can be seen in the water and furnish the basis for many complaints by visitors and others. Usually the sea clears along the shore in a few days and at times, in a day after, the deposit on the beach.

When the garbage or refuse is cast upon the beaches it frequently occurs that fish pound nets in the vicinity of such beaches are torn by garbage or refuse in the water thrown against them and in addition to the damage so resulting they become fouled and difficult to handle. The repair of them from the effects of the garbage and refuse costs many thousands of dollars, which must be borne by the owners. The presence of garbage and refuse in the water in the vicinity of the nets injuriously affect the business of fishing by such nets.

(10) Occur, When.

The deposits of garbage and refuse on the beaches occur when the winds are from the east or northeast. A storm or severe blow from either of these directions does and will bring the garbage, and a wind of from twenty to thirty miles an hour does also bring it to and upon the shore; as also does an east or northeast wind of two or three days duration. Sometimes the garbage and refuse are brought in by southeast winds. The heavier deposits occur on some of the beaches four or five times a season, and occur frequently throughout the year, varying in number with the different beaches.

There is no conflict in the testimony as to the foregoing general statement. The sections thereof, numbered respectively, (1) to (10), both inclusive, are made a part of my findings of fact.

(11) Dumping.

Nor is there any dispute as to the fact of the disposal by the City of New York of garbage, street sweepings and rubbish by dumping the same at sea. The defendant admits it does now and has for years since the fall of 1918, dumped these things in the ocean. It produced a statement from its records showing that it has dumped into the ocean during the last six years an average of more than a million and a third cubic yards per year; that the last year, 1929, was above that average and exceeded the amount dumped in either of the three preceding years. Reduced to tons, the disposal by dumping in the ocean during 1929 was approximately 493,000 tons. In the winter months there are less materials dumped than in the summer months. In February 1929 there were 52,000 cubic yards dumped, and in June of that year 192,000 cubic yards. These dumpings are made every day except when the weather conditions prevent. The foregoing section numbered (11), title "Dumping" is made a part of my findings of fact.

(To avoid repetition of statement I also make a part of these findings of fact, the following sections, entitled: History of Dumping, Complaints, Supervisor's Reports, Quantities, Appearance and movement, and Incinerators, numbered, respectively, from 12 to 17 inclusive.)

(12) History of Dumping.

For about twenty years prior to 1918, the City of New York disposed of its garbage and street sweepings by what is known as the "reduction system" and except for a brief period during 1906 did not dispose of these things at sea. Some necessary repairs or alterations in the reduction plant in 1906 made it necessary to dispose of these materials otherwise for a short period, and during that period they went to sea. The by-products from the "reduction system" were disposed of.

In 1918 the reduction plant at Barren Island having been destroyed by fire, occurring in 1917 and the contractor operating the one at Staten Island having failed, the city was confronted with the situation that it had no method for the disposal of its garbage and waste, and accordingly applied to the Supervisor of the Harbor of New York for permission to dispose of these materials at sea. This Supervisor of the Harbor is an officer provided for by the Act of Congress of June 29, 1888 (25 Stat. 209), entitled an "Act to prevent obstructive and injurious deposits within the Harbor and adjacent waters of New York by dumping or otherwise and to punish and prevent such offenses". This Act and some amendments thereto are made Sec. 441 *et seq.* of the U. S. Code, 44 Stat. 1072.

Under date of August 8, 1918, Dr. R. S. Copeland, then Health Commissioner of New York, addressed a communication to the Supervisor of the Harbor stating the very serious situation confronting the city because of garbage and said:

"The only present method we have of getting rid of garbage is to dump it at sea. . . . In order to pro-

tect the health of the citizens of this city it is absolutely essential to get rid of the garbage and without delay. I trust this will meet with your approval. But I want you to understand that we do not contemplate any permanent use of so inadequate a system. It is simply a temporary expedient to bridge over an emergency."

A similar request for permission went to the Supervisor of the Harbor from the Commissioner of Street Cleaning of the city. Because of the conditions thus outlined the Supervisor of the Harbor gave permission for the dumping of garbage at sea and prescribed an area southeast of Scotland Light Ship in which it should be dumped.

Later still, complaints having reached his office from the New Jersey coasts the Supervisor designated three dumping areas, located respectively at distances of eight, twelve and twenty miles southeast of Scotland Light; the eight mile area to be used during the winter months; the twelve mile area in the early spring and late fall months, and the twenty mile area in the summer and later spring and early fall months. The shorter distances were allowed in the seasons mentioned because of the unseaworthiness of the scows in the service in the heavy seas usually prevailing during such seasons of the year and the time consumed in towing them to the dumping places and return in rough weather. The dumping areas are approximately ten, twelve and a half and twenty-two miles, respectively from the shore of New Jersey.

The practice of dumping the materials at sea, begun as an emergency, has continued, but its character as an emergency authorization does not appear to have been altered.

The materials to be dumped are loaded upon scows at designated city docks from wagons and trucks collecting them in the city. These scows are towed by tugs in tows of two or three scows to the area of disposal. Accompanying each of the tug boats is a "dumping inspector" from the office of the Supervisor of the Harbor whose duty it is to see that the dumping is done within the prescribed areas.

He is required to report on each occasion directly to said office the facts as to the scows and the place of the dumping.

(13) Complaints.

I find that complaints have been made and summarize the facts as follows:

Complaints of the condition of the beaches and adjacent waters produced by the deposit of garbage or refuse thereon have been made frequently for years by visitors to the different resorts, by residents of the municipalities and by municipal authorities, and by organizations of citizens having as a purpose the correction of these conditions. Such complaints in different forms and the conditions giving rise to them have been frequently brought to the attention of the defendant, its Mayor and other agents.

In December, 1918, a few months after the dumping at sea began defendant's Mayor requested the Supervisor of the Harbor that he authorize a change in the dumping places so as to shorten the distance to be traveled by the scows. The Supervisor declined this request, and in his letter to the Mayor called attention to conditions produced on the New Jersey shores during the year 1906, when for a short period the defendant had been authorized to dump its garbage at sea, and stated that in view of this experience he should not be called upon to "jeopardize the health of residents and the sanitary condition of the beaches along Long Island and New Jersey coasts by any modification of the conditions as to the disposition of such offensive materials as are present in operation". And he added: "As I have already stated to you in my previous communication, the deposit of this material at the mouth of the harbor is most objectionable from every point of view."

In the report hereafter mentioned, submitted to the Mayor of New York, June 1, 1921, the Committee appointed by him to report on the question of disposal of waste by the City, said amongst other things:

"Aside, however, from the question of cost it seems undesirable to dump garbage at sea as it is being done at

the present. It is known that the federal authorities quietly resent if they do not openly object to it, and there is always the possibility of objection from other communities which have in the past claimed that they have been injured by the practice."

In June, 1923, the Mayor of Asbury Park complained to the Mayor of New York of the condition. The reports of the Supervisor of the Harbor in evidence, show that repeatedly since 1920 the question of alternative plans for garbage disposal has been discussed with the city. The defendant's Commissioner of Street Cleaning department and its Corporation Counsel attended a meeting in 1923 of representatives of the organizations already mentioned as formed for the purpose of stopping the pollution of the beaches and stated in effect that the dumping would soon stop.

The several Governors of New Jersey from 1922 to 1929 have been active and earnest in bringing the beach conditions arising from garbage cast thereon to the attention of the Mayor of New York, and have appealed to the Secretary of War for relief. The Secretary of War has directed the Supervisor of the Harbor to bring these conditions to the attention of the City and has urged on the Mayor the "importance of early completion" of the plans for incinerators.

These beach conditions with promises to seek remedies against their continuance have been the subject of platform declaration by one or both of the two major political parties in New Jersey from 1922 to 1929.

Governor Sulzer in 1924 and 1926, Governor Moore in 1927 and Governor Larsen in 1929 discussed the same subject in their annual messages.

It has been the subject of joint resolutions by the legislature in 1927 and 1928 and 1929.

The City of New York, through its Mayor and other responsible agencies, has been informed of these beach conditions and their injurious effect together with the desire

of the people of New Jersey that they cease, and this information has been repeatedly given said city.

(14) Supervisor's Reports.

The Reports of the Supervisor of the Harbor of New York, included in the annual report of the Chief of Engineers for the years 1918 to 1929, inclusive, mention the fact that the defendant's garbage is being disposed of at sea. The report for 1918 states that because of the destruction of the plant at Barren Island "it was necessary to dispose of this objectionable material at sea," and that the point designated for its disposal was fifteen miles southeast of Scotland Light.

In 1919 the report stated that "the practice of disposing of garbage at sea has continued." In 1920 the report states: "About two years ago at the request of the New York City Commissioner of Street Cleaning and the urgent solicitation of the Commissioner of Health the Supervisor authorized the disposal of city garbage at sea as a temporary measure to continue for two or three months only. The practice still continues and there is no prospect of an immediate change." The substance of this statement appears in the reports for the subsequent years.

In a letter dated September 10, 1925, from the Secretary of War, in response to one from the Governor of New Jersey complaining of garbage conditions on the shores of the State, the Secretary disclaimed that any authority to dump garbage emanated from his office but stated that permission had been granted by the Supervisor of the Harbor in New York.

The disposal of its garbage at sea has continued except that in February, 1924, there was put in operation by the City of New York a 300-ton "incinerating" plant, the first plant after the cessation of the "reduction system." In November, 1925, another incinerating plant was put in operation, and since then additional incinerating plants have been put in operation.

(15) Quantities.

The amount of garbage and refuse dumped in 1924 was approximately 1,675,000 cubic yards; and in that year one incinerating plant was in operation. In 1925 the amount was approximately 1,500,000 cubic yards, a second incinerating plant going into operation in November of that year. In 1926 the amount was approximately 1,300,000 cubic yards; in 1927, 1,200,000 cubic yards and in 1928 an increase over the last figure; while in 1929 the amount rose to 1,478,165 cubic yards, though there were in operation nineteen incinerating plants. The amount in tons is obtained by dividing the cubic yards by three. It therefore appears that during 1929 there were 492,721 tons dumped; an average of more than 40,000 tons per month.

The dumping goes on each day except when the weather prevents taking the scows to sea, which latter increases the amount that must be dumped when the scows can go to sea. The daily average exceeds 1,000 tons per day. The daily average over the year's operation does not reflect the conditions as they are because less garbage is dumped in winter than in summer. Thus in February, 1929, there were dumped about 52,000 cubic yards, something over 17,000 tons; while in June of that year there were dumped approximately 192,000 cubic yards, or 64,000 tons; a daily average of more than 2,000 tons.

(16) Appearance and Movement.

When the dumping areas is reached, the side gates of the scow are opened upon signal from the tugs, and the contents slide to the water. These are intermixtures of garbage, street sweepings and rubbish. When they slide from the scow, large portions sink, but other large portions float on the surface or are held in suspension by the water. The facts confirm the statement made by a Commission appointed by the Mayor of New York in June, 1907, hereto-

fore mentioned, that "unfortunately the less harmful material sinks and the foulest floats." These floating and the suspended materials spread in a mass extending at times six or more miles in length, of varying widths, and interspersed with lanes or "slicks," the latter so-called because of grease particles on the surface. Such parts of the garbage or refuse as float either on the surface or in suspension in the water, move with the direction of the wind and current, the wind exercising the greater influence on the direction of its movement. The mass moves at times westward and northward or towards the shores of New Jersey or Long Island, according to the direction and velocity of the wind.

The plaintiff caused an investigation to be made at the dumping places in the summer of 1929, of the conditions there when the scows discharged their contents. The persons making these investigations made more than thirty different trips to the dumping places, and on at least fourteen of them were close by when the scows dumped their contents, and they observed the same.

The defendant sent to the dumping areas on three occasions in February and March, 1930, persons to examine and report upon conditions. The Supervisor of the Harbor sent an agent to these areas to investigate the floating garbage in February, March and April of 1929, and this agent made six trips. They all concur in the general conclusion, and I find it to be a fact that the mass spreads out on the surface of the water, gradually breaking up into smaller areas and moving for indefinite periods with the wind, some of the materials being on the surface and some in suspension. The Supervisor's agent, instructed to follow the floating mass for 24 hours, found on one occasion that the garbage went about fourteen miles in twelve hours, the drift being towards the Narrows; on another occasion the drift being westward under a variable east wind from three to thirty-five miles, went seventeen miles in 24 hours, and was about six miles off the New Jersey shore when he left.

A large number of fishermen whose business is lobster fishing, taking them for miles out from the shore, were examined as witnesses. Many of these men go out every day and have followed their avocation for many years. They have frequently seen the dumping and the masses of floating garbage that followed. Their boats pass through or around such masses as they go or come. The mass is so thick at times that boats cannot go through it. They have seen these floating areas of garbage and refuse at various points between the dumping places and the New Jersey shore, and some have followed it from the dumping place to where it went ashore.

Members of the Coast Guard from different stations on the New Jersey shore have frequently seen floating areas of garbage and refuse near the shore and at some distances from the shore, the area varying in size from several acres to narrow strips. Parts or areas of these masses of garbage or refuse in suspension appear frequently, and are seen at short distances off shore, by persons on the shore, and some are encountered by persons in pleasure boats or fishing boats at divers places off shore.

While the parties sent to the dumping places by plaintiff were there, a photographer among them took a number of photographs showing the conditions of the garbage on the water, which were introduced in evidence. A number of the fishermen identified conditions which they had witnessed as being similar to those shown by some of these exhibits. The parties sent out as stated by plaintiff cast into the mass on several occasions a large number of sealed bottles containing self-addressed and stamped cards, with the request that any finder return them by mail. About twenty-five per cent of these cards came back to the parties by mail from persons along the New Jersey shore and Long Island shore, and some from farther north.

During fourteen times these persons went out in May, June and July of 1929, they made a list of things seen in the water after the scows were dumped. This list contains

the identical kinds of materials that are heretofore stated to constitute the deposits on shore: fruits and fruit skins; vegetables, electric light bulbs, papers and rags, wooden boxes, crating, pasteboard boxes, dead animals and many other things. The mass falling from the scows forms piles a foot clear of water. Gradually displacement takes place, and the heavier stuffs, finding their way through the floating mass, sink.

The odors arising from the mass are offensive and nauseating. The Supervisor of the Harbor of New York, in his report to the Chief of Engineers in 1918, said: "Garbage deposited at sea, no matter what the distance from shore, is apt to wash up on the beaches." In each of his subsequent reports it is said in substance: "Experience indicates that garbage at sea at no matter what distance is liable to wash up on the beaches."

I find that large parts of these floating and submerged areas of garbage and refuse, dumped by the defendant, are driven are carried by winds and water to and upon the shores of the plaintiff, and constitute the objectionable materials thereon and in the adjacent water, hereinbefore described, and that the winds in such cases come from the east or the northeast, and sometimes from the southeast, as has been heretofore found.

(17) Incinerators.

As hereinbefore stated, the method of garbage disposal in use by defendant prior to October, 1918, was what was known as the "Reduction System," by which the by-products were conserved. It began the disposal of garbage and refuse at sea in October, 1918, and has continued the same. In the meantime, however, it has built a number of incinerators as will later appear.

In 1920, a Committee was appointed by the Mayor of New York to report upon the subject of "Collection and Disposal of City Waste." This committee was composed of the heads of departments and officials, including the

Health Commissioner of the State, who had requested permission for the disposal by the city of its garbage at sea, as hereinbefore stated. The report to the defendant's Mayor, dated June 1, 1921, was introduced in evidence. Asserting that "There is perhaps no more important or difficult task confronting any municipality than this one of waste removal," the Report made estimates based upon the data before the committee that in the Boroughs of Manhattan, the Bronx, and Brooklyn alone, the Street Cleaning Department in 1920 disposed of about ten million cubic yards of "ashes, rubbish, street sweepings, garbage and dead animals," or approximately 270,000 tons of rubbish, 440,000 tons of garbage and 300,000 tons of street sweepings." And further estimated that the number of dead animals, aside from "large animals" amounted in 1920 to 217,600 small animals, such as sheep, calves, hogs, cats and dogs.

As to the method of disposal of garbage they reported: "The greatest objection to the present system of disposing of waste materials is in connection with the method now being used for getting rid of garbage, which is both unsanitary and uneconomical. For some years the disposal of garbage not only did not cost the city anything, but as a matter of fact returned a small yearly profit. . . . Aside, however, from the question of cost it seems undesirable to dump garbage at sea as it is being done at present. It is known that the Federal authorities quietly resent, if they do not openly object to it, and there is always the possibility of objections from other communities which have in the past claimed that they have been injured by the practice. When these objections become sufficiently strong it may be that New York will find itself so unprepared as to be unable to quickly introduce a more satisfactory form of disposal."

The Committee made no final recommendation for the disposition of garbage, as to the method of incineration or reduction, pending further investigation.

Long prior to the foregoing report, which was made June 1, 1931, a report had been made by a Commission consisting of distinguished consulting engineers, appointed by Mayor McClellan of New York which reported to him on December 31, 1907, upon the question of street cleaning and waste disposal. This report is known as the Pegram, Henry and Whinery Report. This Committee reported adversely to dumping garbage and refuse at sea, among other things saying: "All of the refuse collections could be dumped into the Atlantic ocean, but unfortunately the least harmful material sinks and the foulest floats, so that much of the floatable mass will be scattered along beaches through the action of current and wind. This fouling of beaches creates a nuisance that the public should not be asked to tolerate."

Mr. Samuel A. Greeley, an hydraulic and sanitary engineer of recognized experience and ability, with practical knowledge of the methods of the disposal of garbage, condemned the method of disposing of garbage and refuse at sea for very much the same reasons given by the Committee above mentioned in their report of 1921. He gave as his opinion that either incineration or the "Reduction System" is good.

Considerable portions of its garbage and refuse collected by the defendant has been and is being disposed of by incinerators constructed by the defendant. The first of these was put in operation in 1934, some five years after the dumping at sea began. In December, 1929, the defendant had in operation three incinerators in the Borough of Manhattan, none in the Bronx, nine in Queens, five in Brooklyn and three in Richmond.

The Department of Sanitation in New York City is a newly created one under the law and went into effect on December 1, 1929. It took over the jurisdiction formerly exercised by the Department of Street Cleaning and some other agencies of the City. On December 23, 1929, the new Department of Sanitation presented to the Mayor of the City a program for increasing the number of incinerators

in the five boroughs as follows: Five 500-ton plants in Manhattan; four 500-ton plants in the Bronx; five 500-ton plants in Queens and five 500-ton plants in Brooklyn, and the reconstruction of two plants in Richmond.

The City now has the power of condemnation, which it did not have prior to 1929. It does not appear what if any action has been taken by the Mayor or city authorities upon the program presented by the new Department of Sanitation.

The evidence does not show the cause of the apparent delay by the defendant in adopting and putting into operation the incinerating system. It was in 1924, some five years after the defendant began dumping at sea that its first incinerator was put into operation, and during the next succeeding five years others were built. Those constructed and in use fall far short of taking care of the garbage and refuse situation. A reason offered for the delay is that the City did not have the power of condemnation and could not override objections in localities to the operation of incinerators therein. This power was acquired in 1929 and there is no evidence explaining why it was not acquired sooner.

I conclude that the method of disposing of garbage and refuse by dumping the same at sea is not an approved or a good system and that disposition of such material by incineration or the "Reduction system" is a proper way to dispose of the same. I further conclude that the delay of defendant in adopting a proper method of disposal has been unreasonably long.

SOME ISSUES OF FACT.

The defendant contends, however, that the garbage and refuse on the beaches result from the disposals, first by steamships, and second, by scows of private contractors and by some others to be named.

(1) Steamships: It is to be observed that the lanes for European and foreign vessels to and from New York pass to the north and east of the designated dumping areas; that is to say, these dumping areas are between the lanes and the shores.

(a) There is evidence that some coastwise and other vessels discharge garbage or refuse into the ocean. Vessels out of New York go southward or come from southern ports to New York, passing the New Jersey coast at a distance of from three to eight miles and their general routes lie between the dumping places of the City and the shores.

The evidence as to the number of such vessels is that produced by the defendant to the effect that in December, 1928 and January of 1929 there were 1227 vessels entering the Port of New York from southern ports, and during July and August of 1929 the number was 1892. That the number clearing from New York for southern ports in December, 1928 and January, 1929, was 1173; and in July and August, 1929 was 1192. Whether freight or passenger vessels, or the relative number of each does not appear, but if it be assumed that the vessels in and out of New York for the four months mentioned represent a fair average of the number for each month of the year and that the average per day is the same for the different years the result would show that approximately thirty entered from southern ports and twenty departed from New York for southern ports each day, the difference in number in those coming in and those going out being accounted for by the fact that some entering New York from southern ports clear therefrom for other than southern ports.

A witness introduced by the defendant, being one of the three sent out by the defendant to examine the conditions at the dumping places, and a pilot of experience, made an estimate to the effect that there were twenty vessels a day going and coming from southern ports to New York.

The direction of the vessels, whether going to or clearing from New York affects the amount and kind of material

they discharge. Thus vessels coming from southern ports discharge their garbage and refuse about as fast as it is produced, or shortly after leaving their last port of call, except vessels coming from nearby places, such as Philadelphia to New York, which are supposed to discharge their garbage and refuse after leaving Delaware breakwater and there is no reason to assume that the vessels from southern ports allow these things to accumulate until they arrive off the New Jersey coast.

(b) On the other hand the vessels in New York harbor which provide for their crews while in port and which do not provide for the disposal of garbage and refuse while in port (as some vessels and lines do arrange) have to get rid of the same after getting out of the harbor. The sweepings from the cargo, the cleanings from the ships, including dunnage and such crates and boxes as may have accumulated and other materials are piled upon the deck together with garbage preparatory to casting the same overboard after the vessels have gotten under way. There is evidence that some of the vessels and a majority of the lines operating out of New York southward do not accumulate garbage or other refuse matter but make arrangements for its disposal while in port. Crews of some vessels are maintained on board and crews of others are not maintained while in port. There is evidence that some vessels southbound begin the disposition of their accumulated garbage, refuse and rubbish soon after leaving the point southwest of Scotland Light and continue to discharge as they proceed. There is an estimated amount by two or three witnesses for the defendant, being the same witnesses who went out to make the investigation at the dumping areas for the defendant, that forty to fifty tons are discharged from some of these vessels leaving New York. The amount of the garbage that is intermixed with the other materials is not stated or estimated.

(c) In 1924 owing to complaints to his office of garbage reaching the shore, the Supervisor of the Harbor sent re-

quests to all shipping companies that their vessels refrain from discharging garbage within twenty-five miles of Ambrose Lightship, and received from many of them assurance of their cooperation.

(d) There is evidence by one of the witnesses already mentioned for the defendant that vessels, sometimes as many as fifty, coming to New York, are held by fog or heavy seas at anchor off the lightship for a day or two, and while there throw overboard their accumulated garbage and refuse material.

There is testimony by a special agent of the defendant's department of sanitation, giving the location of various docks of scows of private contractors in the borough of Manhattan, and that on several occasions in March, 1930, he visited some of these dumps and saw wagons and trucks dumping into these scows a variety of materials; and two other witnesses testified to similar conditions.

There is no evidence that any garbage or refuse from these places is dumped at sea. There is no evidence that scows receiving the materials mentioned by the three witnesses in March, 1930, dumped the same at sea, or where they disposed of it.

On the other hand there is testimony from officers of ships operating along the coast that a few bushels of garbage is cast overboard from vessels coming out of New York and largely taken up by gulls; and some members of the Coast Guard testified that they have seen ships cast off garbage in small quantities, these expressing the opinion that the quantities are too small to account for the areas floating or in suspension in the water.

(e) There is evidence that a foreign steamship was seen to discharge garbage on an occasion in or near the waters of New York Harbor, and a photograph of the vessel on that occasion was made an exhibit.

(f) There is evidence that a witness had taken on his vessel a cargo of condemned onions and discharged the

same at sea twenty-five miles southeast of Scotland Lightship.

(g) There is evidence that permits had been issued by the Supervisor of the Harbor to five different concerns to dump mud off shore at points designated as three mile limit southeast of Scotland Lightship, and to three others to dump "cellar dirt" at the four mile limit; and to several to dump "cellar dirt intermixed with rock" at the six mile limit. These concerns dumped the materials mentioned at the various places. Some other materials are permitted to be dumped at the eight mile limit.

(h) From time to time and infrequently cargoes of foodstuffs, vegetables and fruits, condemned by the Board of Health authorities, are disposed of at sea by outbound vessels under permits, the amounts being relatively small. Such deposits are beyond the area used by the defendant. A system of patrol boats and of inspection is maintained by the Supervisor of the Harbor to prevent depositing materials at other than the stated areas.

(i) Scows from the Brooklyn Navy Yard dump materials at the dumping areas used by the defendant, their contents being generally rubbish and refuse with a small amount of garbage.

(j) Another source alleged by the defendant in its amended answer "for a Second defense" is that insufficiently treated and unsanitary sewage from the City of Long Branch and of Asbury Park has been for a number of years discharged into the ocean at short distances from each of these cities.

As to the Long Branch sewer, the evidence consists of a plan of the sewage system and some evidence that complaints were at one time made to the Department of Health which investigated the same; and that the matters were satisfactorily adjusted.

As to Asbury Park sewage, there is evidence that in March, 1930, witnesses for the defendant made an examination of that system and at the outlet of the sewer about

1,000 feet off shore found emerging from the sewer outlet fecal, and vegetable matter and fruit peelings. This phase was explained in rebuttal by the Superintendent of the Water and Sewers in that city, who described the system used, that the sewage collected by the regular intercepting system and no fecal matter goes out. He explained that about once a year, and in winter as a convenient time, there is an opening of the "blow-off gates to relieve the sludge tank of its load", and having properly cleaned and washed the tank, the valve is again closed, and that during the period of this operation materials may go into the outlet that cannot go there when the valve is closed; that this kind of cleaning process was in operation on March 19th, 1930, the date of said visits by said witnesses.

Defendant also introduced a bill of complaint exhibited by the Department of Health of New Jersey against Asbury Park in Chancery in New Jersey, praying an injunction restraining that city from discharging into the ocean inadequately treated sewage from the "municipal sewage treatment works", which discharge, it is alleged, is due to insufficient capacity and design of said works. These works were constructed in 1909. This bill was filed in the summer of 1930, under a proceeding authorized by the statutes of New Jersey.

I have set forth in perhaps unnecessary detail some of the evidence offered by the defendant and have done so (1) to show the latitude extended in adducing proof when much of it under the general denials of the original answer would in strictness be inadmissible. It was generally heard without objection. And (2) to show something of the indefiniteness of the testimony itself.

Manifestly the proof offered by the defendant leaves much to surmise and speculation. Testimony that some vessels discharged garbage and refuse after clearing from New York falls short of establishing a custom by other vessels. Proof that employes of the defendant saw garbage and refuse dumped into scows of private contractors

in March, 1930, has small probative force towards establishing what occurred in 1929 and prior years.

There is proof that some vessels discharge garbage and refuse and that scows with permits to dump cellar dirt frequently have with it pieces of wood in more or less quantities, besides other proof referred to.

Giving to the evidence due consideration, I think it should be concluded that whatever garbage and refuse reaches the plaintiff's shores from coastwise and other vessels and other causes, and other dumpings than those of the defendant, are negligible in comparison with that constantly being dumped by the defendant, and frequently carried by winds and waves from the dumping places to and upon plaintiff's shores, as hereinbefore stated.

SOME QUESTIONS OF LAW.

Some questions of law arising between the parties are as follows:

1. The plaintiff's contention that defendant dumps its garbage in water over soil belonging to plaintiff, that is to say, in the waters of its marginal sea.

2. Effect of permits issued by the Supervisor of the Harbor of New York to defendant.

3. The question of nuisance.

4. Prescription.

5. Degree of proof.

6. Jurisdiction.

1. Trespass.

The plaintiff contends that the dumping of garbage by defendant is upon its property and therefore constitutes trespass.

As the farthest place of the dumping is more than twenty miles from the New Jersey shore, the claim that the "marginal sea" of the State extends to and beyond that point is at least interesting. It is, of course, true that within its territorial limits property rights are to be measured by the rules and decisions of the courts of the State, and that these will be followed by this Court (*St. Anthony Falls Co.* v. *Board*, 168 U. S. 349, 362; *Banse* v. *Keokuk*, 94 U. S. 324, 338; *Rundell* v. *D. & R. Canal*, 20 Howard 60 and 93). But the plaintiff insists that the limit of its marginal sea is not to be measured from the low water line on its shore but from a line drawn between two headlands projecting the one at Montauk Point, New York, and the other at Cape May, New Jersey, and seeks to apply the rule of the common law for determining whether the head or arm of the sea was within the jurisdiction of a given county or outside of it and therefore under the jurisdiction of the sovereign alone.

This method for determining the county's jurisdiction was that the distance between the *terrae fauces* should be no greater than to render it possible for a person to discern with the naked eye what was being done on the opposite shore. Plaintiff argues that in this country "we thus determine the jurisdiction of states rather than of counties".

This Court said in *Manchester* v. *Massachusetts* (139 U. S. 240, 263), that "there is no indication that the customary law of England in regard to the boundaries of counties was adopted by the Constitution of the United States as a means of determining jurisdiction of states." The Court was there considering a contention that the jurisdiction of the State as between it and the United States should be confined to the border of the counties and that the counties should be defined according to the customary English usage, by the application of the rule as to headlands. This Court said (page 264): "The extent of the territorial jurisdiction of Massachusetts over the sea

adjacent to its coasts is that of an independent nation and except in so far as any right of control over this territory has been granted to the United States this control remains with the state."

In *Martin* v. *Waddell* (16 Pet. 307, 410), language from which is applicable to New Jersey, this Court said: "For when the Revolution took place the people of each state became themselves sovereign and in that character hold the absolute right to all their navigable waters and the shores to them for their own common use, subject only to the right since surrendered by the Constitution to the general Government." To the same effect see *Illinois Central Railroad Company* v. *Illinois* (146 U. S. 387).

At the time the plaintiff became a state, succeeding to the rights of English sovereign, the common law rule was that the territorial limit extended "only to such distance as is capable of command from the shore of the range of a cannon, which for the purposes of certainty is regarded as one marine league, although for the purposes of self-protection in times of war and for the prevention of fraud upon its revenues each nation is accustomed to exercise authority beyond this limit. (Gould on Waters, 3; Angell on Tidewaters, 2.)

In *Manchester* v. *Massachusetts, supra*, this Court said (p. 258): "We think it must be regarded as established that as between nations the minimum limit of territorial jurisdiction of a nation over tide water is a marine league from its coast; that bays wholly within its territory, not exceeding two marine leagues in width at the mouth are without this limit, and that included in this territorial jurisdiction is the right of control over fisheries. . . . The open sea within this limit is, of course, subject to common law rights of navigation and the government for the purpose of self-protection in times of war or for the protection from fraud on its revenues, exercises authority beyond this limit."

In *Cunard Steamship Company* v. *Mellon* (262 U. S. 100, 122), this Court said: "It is now settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land area under its dominion and control, the ports, harbors, bays and other inclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coast line outward a marine league or three geographical miles."

The view of Chancellor Kent (1 Kent Com. 30) and of other writers on international law cited by complainant, that our Government could reasonably assume the control over waters of our coast "though included within lines stretching from quite distant headlands", as for instance from Nantucket to Montauk Point, and from that point to capes of Delaware, and from Florida to the Mississippi River, do not serve to increase the territorial limits of a state. The headlands mentioned are not the *"terrae fauces"* of the common law, which involved points within the territory of one sovereign. The assertion by the general Government of power conferred by the States does not operate to increase the territorial limits of a State. The treaty making power and that of providing for the common defense, as well as the power applicable to commerce and navigation admit of the assertion of claims by the United States no longer open to the several States. (*United States* v. *Rauscher*, 119 U. S. 407, 418; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Maiorano* v. *Baltimore Road*, 213 U. S. 268, 272.)

As a practical expression by the Federal Government on this question there may be mentioned the comparatively recent treaty with Great Britain relative to infractions of the Prohibition Laws and fixing a limit, sometimes called the "Twelve Mile Limit", Article I of which provides:

> "The High Contracting Parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coast line outwards

and measured from low water mark constitutes the proper limit of territorial waters". (See *Fore* v. *United States*, 272 U. S. 593, 607.)

The State of New Jersey succeeded to rights of the English crown. (See *Martin* v. *Waddell*, *supra*, citing *Arnold* v. *Mundy*, 6 N. J. L. 1).

In its first constitution, adopted July 2, 1776, Art. XXII, it is provided: "That the common law of England as well as so much of the statute laws as have been heretofore practiced in this colony shall still remain in force until they shall be altered by future law of the legislature". (1 Comp. Stat. XXXII).

And in its present constitution, it is provided that the common law and statute law "now in force" and not repugnant to the constitution shall remain in force until altered or repealed. (I Comp. Stat. XLVII).

The Statute of New Jersey defining the boundary of counties provides (109 Sec. I), the "territorial limits of each county of this State fronting upon the sea coast be and the same are hereby extended to a line parallel with the ocean shore line of said counties and extend easterly three nautical miles therefrom and the division lines between said counties as they now exist be and the same hereby are extended from the several points where they now reach the sea in course due east until they severally reach said outer line of said counties as hereby established." (2 Comp. Stat., p. 1703, Public Laws of 1906, p. 542).

Reference has already been made to the Act requiring licenses for pound net fishing. Another Act (2 Comp. Stat., Sec. 123, p. 252) makes it unlawful for any person to take with "purse or shirred nets" certain fish in any county within the jurisdiction of this State, including a county on the Atlantic ocean within three nautical miles of the coast line."

In *Gough* v. *Bell* (22 N. J. L. 411, 455), it is said: "This title, which by the common law of England is vested in the King, upon the Revolution became vested in the people of

the State. . . In this State the rule of the common law as to the limit of its rights remains unaltered."

I think the established rule of the common law should be accepted in determining the territorial limits of New Jersey in the soil under water and that its claim that the dumping of garbage is upon its property is not sustained.

As before stated, large areas of garbage and refuse floating upon or held in suspension by the water, which have been dumped by defendant's scows, are driven and carried by wind and water to and upon the shores of plaintiff and other portions or areas thereof are held for indefinite periods in the waters above soil owned by plaintiff and do great injury to fishing and bathing in such waters.

2. Permits.

In its amended answer the defendant alleges "for a first defense" that it has, for many years last past dumped the garbage and some refuse collected by it in the Atlantic ocean, under the supervision of the Supervisor of the Harbor of New York and in accordance with and only after the issuance of permits by said Supervisor under the authority conferred on him by the Act of June 29, 1888" (29 Stat. 209, as amended; Secs. 441, 443, 449 and 451 U. S. Code) "at points eight, twelve and twenty miles southeast of Scotland Light and about ten, twelve and a half and twenty-two miles distant, respectively, from the New Jersey shore (being clearly in excess of one marine league from said shore) and not within the navigable waters of said State of New Jersey or of the United States" and adds that "such dumping occurring at these points this Court has no authority to enjoin said City . . . from said dumping of garbage and refuse."

The plaintiff insists that there is no evidence of any permits.

It is a fact that no written permit was introduced in evidence but this is not to say that there is no evidence of permis.

A witness introduced by defendant and afterwards by the plaintiff in rebuttal was Captain Anderson, detailed under the provisions of the Act of June 29, 1888, to perform the duties of Supervisor of the Harbor of New York. Captain Anderson, having made a general statement relative to the duties of his office under the Act was asked:

"Q. Permits have been issued by your office to the city of New York to dispose of garbage and refuse material at sea?

,"A. They have.

"Q. Will you explain for our information as well as for the record just how these permits are issued, the procedure so that we may understand for the first time how that is done?

"A. In issuing these permits we have dealt directly with the old department of street cleaning, which is now a division of the Department of Sanitation. They have to apply on a printed form for permission to move and dispose of whatever class of material they may have. We have certain dumping grounds that are customarily used and if their request meets the approval of the office the permission is granted and the permit is issued. This permit is good for only a limited number of days.

"Q. And as the barges and tows proceed to sea under permit is there some representative of your office stationed in the upper and lower Bay to inspect or collect this permit?

"A. On these two boats, towing loads of that description we have an inspector, called a dumping inspector, whose job it is to see that the dumping does not take place short of the designated dumping ground.) Also we have on duty patrol boats from my office which are customarily stationed in the vicinity of the Narrows and around Sandy Hook and a little outside and these boats inspect outward and inbound tows and make appropriate notation upon their permit, which they collect." The statute contemplates that they will be collected.

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This witness further explained that the officers on the patrol boats noted the time of passing and returning by the tows and these notations "are subsequently checked up in my office to see whether the lapsed time would permit them to go to designated dumping ground."

This officer had testified, as stated, without objection, that permits were issued to the defendant. In addition, the plaintiff has shown by repeated statements in the reports of the Supervisor made a part of the annual reports of the Chief of Engineers for the years 1918 to 1929, inclusive, introduced in evidence, that the Supervisor had given permission to the defendant to dispose of garbage and refuse at designated places, and had also shown by the letter of the Secretary of War to the Governor of the State that the "permission" was given by the Supervisor of the Harbor and not by the office of the Secretary of War to dump the garbage in an "emergency"; and further by the Supervisor's statement to the Mayor of the City when the latter requested a change in the designated area.

In addition to these it affirmatively appears in evidence not only that this officer designated the place where the dumping could be done but there went from his office with each tug towing the scows a "deputy inspector" to see to it that the dumping actually took place at the designated places. The established fact is that the defendant had the Supervisor's authority to dump the materials, whatever that authority may amount to, and would seem to make unnecessary the production of one or all of the "permits", which in the ordinary practice of the Supervisor's office, would amount, in ten or twelve years, to probably a thousand or more. I find as a fact that the dumping was by permission of the Supervisor of the Harbor.

The Act of 1888 (U. S. Code, Secs. 441 *et seq.* 44 Stat. 1072) was entitled "An Act to prevent obstructive and injurious deposits within the Harbor and adjacent waters of New York City by dumping or otherwise and to punish and prevent such offenses."

This Act, amended in 1899 (U. S. Code, Sec. 443), provided that a line officer of the Navy shall be designated by the President as Supervisor of the Harbor "to Act under the direction of the Secretary of War in enforcing" its provisions. Depositing of certain kinds of materials in the tidal waters of New York or its adjacent tributaries or in those of Long Island Sound "within the limit which shall be prescribed by the Supervisor of the Harbor" are strictly forbidden. One section provided for a permit defining the precise limits within which the discharge of the scows may be made.

Material parts of the Act of 1888, and the amendment of 1899, are as follows: Sections 441 and 453 U. S. Code—

Title 33. Secs. 441. *Deposit of refuse in New York Harbor and adjacent waters prohibited; penalty.*—The placing, discharging, or depositing, by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound, within the limits which shall be prescribed by the supervisor of the harbor, is hereby strictly forbidden, and every such act is made a misdemeanor, and every person engaged in or who shall aid, abet, authorize, or instigate a violation of this section, shall, upon conviction, be punishable by a fine or imprisonment, or both, such fine to be not less than $250 nor more than $2,500, and the imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction of this misdemeanor. (June 29, 1888, c. 496, 1, 25 Stat. 209.)

Sec. 443. *Permit for dumping; penalty for taking or towing boat or scow without permit.*—In all cases

of receiving on board of any scows or boats such forbidden matter or substances as described in section 441 of this chapter, the owner or master, or person acting in such capacity on board of such scows or boats, before proceeding to take or tow the same to the place of deposit, shall apply for and obtain from the supervisor of the harbor appointed, as provided in section 451 of this chapter, a permit defining the precise limits within which the discharge of such scows or boats may be made; and it shall not be lawful for the owner or master, or person acting in such capacity, of any tug or towboat to tow or move any scow or boat so loaded with such forbidden matter until such permit shall have been obtained; and every person violating the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than $1,000 nor less than $500, and in addition thereto the master of any tug or towboat so offending shall have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. (May 28, 1908, c. 212, 8, 35 Stat. 426.)

In *United States* v. *Sadie* (41 Fed. 396) Judge Lacombe speaking of this Act of 1888 says (p. 398): "The bodies of water referred to are (a) the Harbor of New York; (b) waters adjacent to the Harbor of New York; (c) waters tributary to the Harbor of New York; (d) Long Island Sound, and as to each of these bodies of water there is a restriction of application of the Act to such waters only as are tidal."

In the present inquiry only the first two of these descriptions can apply: the Harbor and waters adjacent to the Harbor of New York.

The Act contemplated that the Supervisor prescribe certain limits but there is no evidence in this case as to what limits were prescribed. In *City* v. *Leland* (45 Fed. 380, 381), there is reference to certain prescribed limits.

A construction of the Act of 1888, as amended, becomes important. The defendant relies upon the "permit" or

the permission granted by the Supervisor of the Harbor; who has no authority other than that which the Act confers. It may be noted in this connection that this Act is not affected by the Rivers and Harbors Act of March 3, 1899 (U. S. Code, Title 33, Section 407). The latter is a general Act and as was observed by Judge Thatcher in "The Albania" (30 Fed. (2) 727) Sec. 441, *et seq.* of the Code (the Act of 1888) is a special Act applied to New York Harbor and vicinity and it may be repeated in this connection that the Secretary of War in a communication to the Governor of New Jersey stated that the dumping by New York City was through permission of the Supervisor of the Harbor and not by the Secretary. But the purport of the Act of 1888, as was that of the general Rivers and Harbors Act of 1899, is referable to the power of Congress to legislate for the protection of navigation.

There can be no doubt that the dumping was not within the limits of Harbor of New York, as these limits are spoken of in *United States* v. *Newark Meadows Improvement Company* (173 Fed. 426, 428) as being "within a line from Navesink Lighthouse to Scotland Light thence to Whistling Buoy in Gedneny's Channel and thence to Rockaway Point prescribed by the Secretary of the Treasury as the limits of the waters of the Harbor of New York," pursuant to the Act of February 2, 1895 (28 Stat. 672). It was done at eight, twelve and twenty miles, according to the season of the year, southeast by east from Scotland Light, one of the points in the foregoing description.

In *United States* v. *Various Tugs and Scows* (225 Fed. 505), where it appeared that permits had been issued, it was said by Judge Hand (p. 507): "It seems to me that a permit to dump no less than four miles east by southeast of Scotland Light Ship excludes by implication dumping within New York Harbor and its adjacent and tributary waters inside of that point and thus defines the precise limit." He added that even though the limits prescribed by the Supervisor are beyond a marine league from the shore any other interpretation of the national power would

render the Government impotent to protect the harbor and adjacent channel and waters. In order to sustain a conviction under the Act it was held in *Werner Quinlan* v. *United States* (273 Fed. 508), to be necessary for the evidence to show that the Supervisor had prescribed such limits and that the defendant had placed such materials within such limits.

If the limits of the adjacent waters be taken as prescribed by the designation of the places by which dumping was allowable *(U. S. v. Various Tugs and Scows, supra)*, it is manifest from the distance given that the limits are in excess of "one marine league from said shore" to use the words of the amended answer; but it is difficult to understand how this fact affords any defense in this case. If the defendant did not dump the materials nearer than the designated areas the Supervisor's permission would afford protection against penalties of the Act. But can it be said that these permits serve as a defense against the claim of others whose rights have been invaded?

The purpose of the Act is to protect navigation with reference to New York harbor. The authority of the Federal Government does not extend beyond the requirements of navigation. *(Wisconsin* v. *Illinois*, 278 U. S. 367-415.)

In *Cummings* v. *Chicago* (188 U. S 410, 431), it was said with reference to Section 10 of the Rivers and Harbors Act of 1899, that its effect "reasonably interpreted is to make the erection of a structure in a navigable river within the limits of a state depend upon the concurrent and joint assent of both national government and the state government. . . . Without such assent the structure can not be erected by them." *(United States* v. *Bellingham Bay Boom Company*, 176 U. S. 211.)

In *Port of Seattle* v. *Oregon and Washington Road Company* (255 U. S. 55, 63), it is said: "The right of the use of the navigable waters within the several states is limited to the control thereof for purpose of navigation."

And in *United States* v. *River Range Improvement Company* (269 U. S. 411, 419), this Court says: "While Con-

gress in the exercise of this power may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution of the United States *(United States* v. *Chandler-Dunbar Company*, 229 U. S. 62), it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no relation or substantial relation to the control of navigation or appropriate to that end." (See *Wisconsin* v. *Illinois*, 278 U. S. 367, 415.)

The authority conferred by the Act of 1888 upon the Supervisor was not as general as that found in the Rivers and Harbors Act, nor was it an arbitrary power. So far as the defendant's acts are concerned his authority was only permissive. The title of the original Act (that of 1888) shows its purpose was to protect the Harbor of New York. When the powers of the Supervisor are limited to that purpose they do not purport to extend to a general authorization to regulate the dumping of garbage outside of the waters specified in the Act.

The powers which the Supervisor has under the Statute and the effect to be given the permits authorized to be issued are to be strictly construed, because of the effect of the dumping upon the rights of others. "The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property franchises or privileges in which the government or the public has an interest. . . . Whatever is not unequivocably granted is withheld; nothing passes by mere implication." *(Coosa Mining Co.* v. *So. Carolina*, 144 U. S. 550, 562; *Fertilizer Co.* v. *Hyde Park*, 97 U. S. 659, 666.)

In order to accord to the act full scope as a shield for protection, it is not necessary to make of it also a sword of offense.

Nor does the fact that the defendant is a municipal corporation afford immunity from the results of its own action. It was said by the *Massachusetts Court in Haskell* v. *New Bedford* (108 Mass. 208, 214): "The owner of any lands bordering upon the sea may lawfully throw refuse

matters into it provided he does not create a nuisance to others. But it by no means follows that either the city or any private person has the right to deposit filth upon the seashore in such quantities as to create a nuisance to health or navigation. (See *Brayton* v. *Fall River*, 113 Mass. 218, 230). This case quotes and approves *Franklyn Wharf* v. *Portland* (67 Me. 446, 457), to the effect that "The right of defendant to construct an outfall for their sewer in the sea does not include the right to create a nuisance, public or private."

In *Noonan* v. *City of Albany* (79 N. Y. 476, cited in *Huffmire* v. *Brooklyn*, 162 N. Y. 584, 590), it is said: "A municipal corporation has no greater right than an individual to collect the surface water from the land or streets into artificial channels and discharge it upon the lands of another, nor has it any immunity from legal responsibility for creating or maintaining a nuisance."

In *Block* v. *Maryland* (149 Md. 39), the city was enjoined from the commission of a nuisance notwithstanding it claimed that it was authorized by statute to make a contract and that in the performance of that contract a nuisance was created.

My conclusion is that the Act of 1888, as amended, furnishes no defense to the defendant, and that compliance with permits from the Supervisor of the Harbor acting under the provisions of that Act does not furnish a defense nor relieve it from the effect of a public nuisance resulting from or created by its action.

3. Nuisance.

There is no doubt (the amended answer admits) that the defendant for years past, at least since October, 1918, has been dumping large quantities of garbage and refuse at sea, and principally in places designated by the Supervisor of the Harbor of New York. I use the word "principally" because there is evidence that sometimes through accident or the occurring of something unusual, a few scows have dumped their loads nearer to the shore than the appointed

places. There is also evidence uncontradicted, and I find the fact to be that some scows have left upon them considerable quantities of garbage or refuse after their gates have been thrown open to release the contents and these remnants are cast off by the men in charge as the scows are being taken back from the dumping area. The general practice continues, more materials were dumped in 1929 than in the preceding year.

As already stated, the conditions on the plaintiff's shores and adjacent waters produced by garbage and other objectionable materials alleged in the bill are proved by uncontradicted evidence. A summary of the facts found may be stated as follows: Along the shores are many summer resorts which serve to furnish recreation, pleasure and rest to people. Their beaches when unaffected by the bad conditions mentioned are pleasure grounds for thousands of visitors. A large number of people living in and doing business in these municipalities are dependent for their livelihood upon the resorts and the preservation of their recreational advantages. The summer resorts along these shores constitute one of the plaintiff's most valuable industries and they suffer frequently in annoyance and expense from deposits of the materials mentioned. The expense of the removal of garbage and other materials falls upon these municipalities and individuals, and this expense amounts annually to large sums. Their disposition as soon as can be after being cast upon the shore is imperative. Foul smelling and repellent as they generally are when first stranded, they become more so as soon as they are subjected to the rays of the sun. They attract swarms of flies. The odors create nausea, and sometimes reach into homes. The deposits interfere with, and until removed frequently prevent, the use and enjoyment of the beaches for the purposes to which the latter are adapted and for the comfortable and enjoyable use of which people visit them. They cause many complaints from the disappointments to visitors to the several resorts for recreation and health, as well as from those whose business depends upon

the attendance of visitors. Many visitors leave the resorts because they cannot use the beaches when littered or secure the surf bathing when the waters adjacent hold garbage and refuse in suspension. The shores below high water mark and the soil under the adjacent waters for at least three nautical miles belong to plaintiff, and their chief value is in the fisheries and the fact that they can and do afford the attractions pertaining to summer resorts which fisheries and attractions are seriously interfered with by the deposits in question.

Along with and at times of the deposits there frequently come broken bottles and pieces of glass and wood pieces with nails therein, and the broken glass and nails are a menace to the bathers in the surf and to persons on the beaches. Severe bodily injuries have resulted from them. The rental value of property has been impaired because of the deposits. The decayed and decaying vegetables and animal matters cast upon the shore is offensive to a high degree to sight and to smell. The deposits are frequent and recurrent.

In *Cleveland* v. *Citizens Gas Light Company* (20 N. J. Eq. 201, 204), it is said: "Any business, however lawful, which causes annoyances that materially interfere with the ordinary comforts of human existence is a nuisance which should be restrained, and small noises and bad odors, even when not injurious to health, may render a dwelling so uncomfortable as to drive from it anyone not compelled by poverty to remain. Unpleasant odors from the very constitution of our nature render us uncomfortable, and when continued or repeated make life uncomfortable. To live comfortably is the chief and most reasonable object of men in acquiring property as the means of attaining it, and any interference with our neighbor in the comfortable enjoyment of life is a wrong which the law will redress."

In *Northwestern Fertilizer* v. *Hyde Park, et al.* (97 U. S. 659), this Court considered a case coming from the Supreme Court of Illinois which involved the question of nuisance. The Company sought to defend because of its

charter rights; but this Court held that the State could give an effectual remedy, saying (p. 667): "It rests upon the fundamental principle that every one shall so use his own as not to wrong or injure another. . . . . Pure air and the comfortable enjoyment of property are as much the rights belonging to it as the right of possession and occupancy."

In *Georgia* v. *Tennessee Copper Company* (206 U. S. 230), the State filed its Bill in this Court to enjoin the discharge of noxious gases from the works of defendant in the State of Tennessee. The allegations of the Bill showed that as a result of these gases there was destruction of forest trees, orchards, crops and other injuries. In the course of the opinion it is said: "It hardly is denied and cannot be denied with success that this often is carried by the wind great distances and over great tracts of Georgia land. From the evidence the pollution of the air and the magnitude of that pollution are not open to dispute."

In *Mugler* v. *Kansas* (123 U. S. 623, 673), this Court said: "The ground of equity jurisdiction in cases of purpresture as well as of public nuisance is the ability of courts of equity to give more speedy, effectual and permanent remedy than can be had at law. They can not only prevent nuisances that are threatened and before irreparable mischief results but arrest or abate those in progress and by perpetual injunction protect the public against them in the future. . . . . This is a salutary jurisdiction especially where the nuisance affects the health, morals or safety of the community."

It is well established that noxious smells may constitute a nuisance. (*Baltimore, etc. Railroad Co.* v. *Fifth Baptist Church*, 108 U. S. 317.) In *Block* v. *Baltimore*, 149 Md. 29, 51, where the Maryland court considered a case arising out of the transportation of offensive materials by scows from the city to reduction plants, and says (p. 56): "That the conditions complained of constituted an unwholesome danger and offense is obvious."

Replying to the contention that the bill did not contain allegations sufficient to maintain it, that court, after stating the facts, said (p. 51): "It would be a reproach to the law if it afforded the plaintiff no adequate relief from the burdensome and intolerable conditions shown by those facts."

In *Northwestern Fertilizer Company* v. *Hyde Park, supra,* this Court, adopting the findings of the Illinois Court, said: "That a nuisance of so flagrant character exists, as found by the Court below, is not controverted."

And in *Georgia* v. *Tennessee Copper Company, supra,* this Court granted relief against a nuisance caused by the discharge of gases from the defendant's work in Tennessee, and said (p. 238): "It is a fair and reasonable demand on the part of a sovereign that the air of its territory should not be polluted on a great scale by sulphuric acid gas; that the forests on its mountains, be they better or worse and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the acts of persons beyond its control." (See *Missouri* v. *Illinois,* 180 U. S. 208); *Board of Health* v. *Schmidt,* 83 N. J. Eq. 35, 36; *Butterfoss* v. *State Board,* 40 N. J. Eq. 325.)

I conclude that the conditions described in this case amount to a public nuisance, and that the State and communities affected should not be required to tolerate the same.

4. Prescription.

The authorities declare that if the facts develop a public nuisance there can be no prescription. Thus in *Block* v. *Baltimore, supra,* the Maryland court said (p. 59): "But the wrong complained of and disclosed by the evidence amounts to a public nuisance and there can be no prescription" (citing *Woodyear* v. *Schaefer,* 57 Md. 10).

This Court said in *Northwestern Fertilizer Company* v. *Hyde Park, supra:* "In such cases prescription, whatever

the length of time, has no application. Every day's continuance is a new offense." And in *Missouri* v. *Illinois* (200 U. S. 496, 520), it is said: "The reasons upon which prescription for a public nuisance is denied or may be granted to an individual as against a sovereign power to which he is subject have no application to an independent state."

5. Municipality: Degree of Proof.

But the defendant claims that it is performing governmental functions and entitled to invoke the rule of proof required of plaintiffs in actions between sovereign states. The rule relied upon is stated in *North Dakota* v. *Minnesota* (263 U. S. 364), as follows:

> "In such action by one state against another the burden on the complaining state of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in ordinary suits between private parties. Before this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of another state at the suit of another the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence."

There is a qualification of the rule stated in a case by the State against a corporation or person. "Some peculiarity necessarily marks a suit of this kind. If the State has a case at all it is somewhat more certainly entitled to special relief than a private party might be" *(Georgia* v. *Tennessee Copper Company*, 206 U. S. 230, 237). And further in that case this Court said, at page 238: "This Court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains that it would have in deciding between two subjects of a single political power."

That the defendant is a political subdivision of the State, created as a convenient agent for exercising certain governmental powers entrusted to it by the State *(Hunter v. Pittsburgh*, 207 U. S. 161, 178), or is a department of the state government *(City of Trenton v. New Jersey*, 262 U. S. 182, 187) would seem to be settled by these cases.

The fact is that the parent State has left to the defendant the determination of the method to be adopted in carrying out certain duties, certainly those with reference to sanitation, and the further fact is that the conditions complained of here are the results of the adoption by the defendant of its own methods. It was not necessary that the defendant dump its garbage at sea except in an emergency. It was put on notice as early as 1907 by a report of distinguished engineers to the Mayor of the City, already referred to, that the method of garbage disposal by dumping it at sea is not the best method. In discussing that method of disposition they said as follows:

> "All the refuse collected could be dumped into the Atlantic Ocean but unfortunately the least harmful material sinks and the foulest floats, so that much of the floating mass will be scattered along the beach through the action of the current and wind. This fouling of the beach creates a nuisance that the public should not be asked to tolerate. The cost of sending the scows so far at sea that there would be no danger of fouling the beaches and the delays and interruptions caused by storms forbid the use of this plan. The dumping of refuse at sea should not be resorted to except in cases of emergency when the burdens of such sea-dumping will be of short duration."

Again in 1921 a Committee appointed by the Mayor of New York, and above referred to, made a report to the Mayor in which they stated as follows:

> "The greatest objection to the present system of disposing of waste material is in connection with the method now being used for getting rid of garbage,

which is both unsanitary and uneconomic. For some years the disposal of garbage not only did not cost the City anything but as a matter of fact returned a small yearly profit. Aside however from the question of cost it seems undesirable to dump garbage at sea as it is being done at present. It is known that the Federal authorities quietly resent if they do not openly object to it and there is always the possibility of objection from other communities and from the people claiming that they have been injured by the practice. When these objections become sufficiently strong it may be that New York will find itself so unprepared as to be unable to quickly introduce a more satisfactory form of disposal."

Prior to this last report the City had been informed by the Supervisor of the Harbor of bad conditions on the shores arising from the dumping at sea. The Mayor requested the right to dump the scows nearer than the area at that time prescribed by the Supervisor. The latter declined the request because of the complaints about the garbage.

The defendant had been satisfactorily using the "reduction" system of garbage disposal when in an "emergency" it was authorized to dispose of it at sea. In the meantime it has erected a number of incinerating plants and plans to erect more. One reason given for the delay in building the needed incinerators is that the defendant was not given the power of condemnation of sites. It has such power now, conferred in 1929, and it is a question whether the defendant, given the right and duty of performing a function that may be called a governmental function but not given the power necessary for its full performance may indefinitely follow a course as heretofore stated to the injury of others and still claim that in such matters it is in the position of the state itself. But if the stricter rule be applied I think the only reasonable conclusion to be reached under all the evidence is that the

objectionable conditions on the beaches and in the adjacent waters complained of in this suit are caused by and due to the action of the defendant in dumping its garbage and refuse into the waters of the ocean as already stated. There has not only been an invasion of serious magnitude of the plaintiff's rights extending through some years but it is continuing and is threatened for an indefinite period.

6. Jurisdiction.

The defendant insists further "that the dumping is done at designated places which are not in the navigable waters of the United States but on the high seas, more than a marine league from the beaches and territorial waters of the state of New Jersey, over which this Court has, in this case, no authority, control or jurisdiction."

There seems to be some inconsistency between the contention of the defendant that the permits of the Supervisor afford protection and yet that the appointed places are not within the navigable waters of the United States.

The authorities cited to this proposition relate to the cases in the District Courts where the question was whether the act complained of was done in the one District or another, the holding being that an action to abate a nuisance must be brought in the District where the nuisance is situated. (*United States* v. *Newark Meadows Improvement Company*, 173 Fed. 426; *McGowan* v. *Columbia River Power Association*, 245 U. S. 352.) In *Mississippi & Missouri Railroad Company* v. *Ward* (2 Black 485), it appeared that Ward sued the defendant, a citizen of Illinois in the District of Iowa, to restrain the continuance of an alleged nuisance arising from the manner of the construction of a bridge over the Mississippi River, the boundary between the two states being the center of the river. The allegation was that the obstruction was on the Illinois side. This Court held that the District Court of Iowa was without jurisdiction, and said (p. 494): "He seeks nothing from

the person of the defendant but seeks to remove a local object because he has sustained certain damages from the object. The District Court has no power over the local obstruction inflicting the injury nor any jurisdiction to make inquiry of the fact whether the damage had been sustained or how much. These facts are beyond the Court's jurisdiction and the inquiry outside of the state."

This Court has, however, a jurisdiction that the District Court did not have. In the present case both the aggrieved and the offending parties are before the Court and subject to its decrees. The property affected is within the United States. (*Massie* v. *Watts*, 6 Cranch 148, 159; *Hart* v. *Sansom*, 110 U. S. 151, 154). In *People* v. *International Nickel Company* (168 App. Div. 245, S. C. 218 N. Y. 644), it was held that fumes from an industrial plant in the State of New Jersey brought by the wind into the State of New York to the injury of citizens of that State did not constitute an indictable nuisance in New York because the offense was not committed in New York. The defendant refers to this case as holding that "the site of this nuisance is in another state." The New York court, however, does suggest that the Supreme Court of the United States would be the forum for trial of such a case.

This Court has taken jurisdiction in just such cases. (*Georgia* v. *Tennessee Copper Company, supra*), where it said (p. 237) that the suit was "by a state for an injury to it in its capacity as quasi-sovereign. In that capacity the state has an interest independent and behind the title of its citizens in all the earth and air within its domains"; and further, "When the states by their union made the forcible abatement of outside nuisances impossible to each they did not there agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground there still remained quasi-sovereign interests and the alternative to force is a suit in this Court."

In *New York* v. *New Jersey* (256 U. S. 296), the plaintiff sought an injunction against the discharge of sewage into

the upper bay, a part of New York harbor, claiming that this discharge constituted a serious injury to health, property and the welfare of the State and citizens of New York. This Court took jurisdiction.

This Court also took jurisdiction in *Missouri* v. *Illinois* (180 U. S. 208), where it was alleged that the turning of Chicago sewage into the drainage canal polluted the Mississippi River and created a nuisance. The controversies were regarded as justiciable by this Court even though finally the bills were dismissed. (See *Wisconsin* v. *Illinois*, 278 U. S. 367; *North Dakota* v. *Minnesota*, 263 U. S. 365; *Pennsylvania* v. *West Virginia*, 262 U. S. 592).

I conclude the Court has jurisdiction.

There is expert testimony that the actual construction period for the building of a 350-ton incinerator would be one year, and that one or more can be completed within that duration of time from the period work starts on them severally. The evidence does not disclose what is a reasonable time for determining the availability of sites and for their acquisition.

My conclusions upon the whole case are that the defendant has created and continues to produce a public nuisance on the beaches and property of the State of New Jersey, as has been hereinbefore found, and that the plaintiff is entitled to relief in accordance with the prayer of the bill; but the defendant should be given a reasonable time within which to put into operation sufficient incinerators to care for its garbage and rubbish. (See *Georgia* v. *Tennessee Copper Company*, supra.)

RECOMMENDATIONS.

My recommendations are:

1. That the Court's decree should declare that the plaintiff is entitled to relief and to an injunction as prayed for, but that before an injunction shall issue a reasonable time

will be accorded defendant within which to carry into effect its proposed plan for the erection and operation of incinerators to destroy the materials such as are now being dumped by defendant at sea.

2. That in as much as the evidence adduced does not disclose what such reasonable time is the case be referred to a Master for findings of fact upon that subject.

Respectfully submitted,

EDWARD K. CAMPBELL,
Special Master.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 17, Original.

STATE OF NEW JERSEY, *Plaintiff,*

—against—

THE CITY OF NEW YORK, *Defendant.*

EXCEPTIONS OF THE DEFENDANT TO THE REPORT OF THE SPECIAL MASTER AND HIS RECOMMENDATIONS FOR DECREE AND TO HIS FAILURE TO FIND AS REQUESTED BY DEFENDANT.

Now comes The City of New York, the defendant above named in the above entitled suit and objects and excepts to the report of Hon. Edward A. Campbell, the Special Master, herein filed in the office of the Clerk of this Court on the 20th day of March, 1931, in the following particulars, to wit:

A. That this Court has jurisdiction to grant the relief demanded in the Bill of Complaint because among other things the suit is one to protect quasi sovereign rights of the plaintiff, because the defendant is before the Court, and the property affected is within the United States.

1. To so much of the conclusion, or purported conclusion, of law, set forth under the heading "Parties and

Jurisdiction" (Report of Special Master, p. 9), as concludes that the case presents a justiciable controversy over which this Court has jurisdiction.

1a. To so much of the finding of fact or conclusion of law, or both, set forth under the heading "Some Questions of Law—6 Jurisdiction" (Report of Special Master, p. 58), as finds that in the present case, both the aggrieved and the offending parties are subject to its (this Court's) decrees.

2. To so much of the finding of fact or conclusion of law, or both, set forth under the heading "Some Questions of Law—6 Jurisdiction" (Report of Special Master, p. 58) as finds that the property affected is within the United States.

3. To so much of the conclusions of law set forth under the heading "Some Questions of Law—6 Jurisdiction" (Report of Special Master, p. 59) as concludes that this Court has jurisdiction.

4. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 49) that The City of New York has not dumped garbage and refuse in the ocean for many years in any appreciable quantities within a marine league (three nautical miles) of the shores of the State of New Jersey, except on rare occasions either when necessary to preserve life where a scow was in danger of foundering or when there is some unauthorized action upon the part of the individuals employed by the contractors in charge of the scows or towboats.

5. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 50) that the territorial waters of the plaintiff do not extend more than one marine league or three nautical

miles from the Atlantic Coast shore line of said State of New Jersey at low water mark.

6. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 51) that the Atlantic Ocean dumping grounds used by the defendant in dumping its garbage as aforesaid are not within the territorial limits of the plaintiff.

7. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 53) that the Atlantic Ocean dumping grounds used by the defendant in dumping its garbage as aforesaid, are not within the navigable waters of the United States.

8. To the failure and refusal of the Special Master to conclude as a matter of law as requested by the defendant (Proposed Conclusions of Law 3 and 4) that he dumping in the Atlantic Ocean by the defendant of garbage and refuse for many years last past at points 8, 12 and 20 miles southeast of Scotland Lightship and about 10, 12 and 22 miles, respectively, from the Atlantic shore of the State of New Jersey, or much more than one marine league from said shore and its waters, was not and is not a dumping thereof in the navigable waters of the United States.

9. To the failure and refusal of the Special Master to conclude as a matter of law as requested by the defendant (Proposed Conclusion of Law 5) that the dumping in the Atlantic Ocean by the defendant of garbage and refuse for many years last past at the points and distances from Scotland Lightship and from the New Jersey shore as stated in Exception No. 8, was not and is not a dumping thereof in the territorial waters of the State of New Jersey.

10. To the failure and refusal of the Special Master to conclude as a matter of law as requested by the defendant (Proposed Conclusion of Law 6) that the dumping in

the Atlantic Ocean by the defendant of garbage and refuse for many years last past at the points and distances from Scotland Lightship and from the New Jersey shore as stated in Exception No. 8, was a dumping thereof on and into the high seas.

11. To the failure and refusal of the Special Master to conclude as a matter of law, as requested by the defendant (Proposed Conclusion of Law 15) that by reason of the dumping in the Atlantic Ocean by the defendant of garbage and refuse at the places, in the manner and under the conditions aforesaid, no justiciable controversy between the plaintiff and the defendant is presented over which the Supreme Court of the United States has authority, jurisdiction or control under Article III, Section 2 of the Constitution of the United States or any other article of said Constitution or under any statute of the United States or under the Common Law.

B. That garbage and refuse in large quantities dumped by the defendant in the Atlantic Ocean more than a marine league from the shores and waters of the plaintiff is driven and carried by the winds and waters to and upon the beaches of the plaintiff and its adjacent waters, thus creating a public nuisance, to the great injury of the plaintiff's rights and property.

12. To so much of Finding of Fact (16) (Report of Special Master, p. 25) as finds that such parts of the garbage or refuse as float either on the surface or in suspension in the water, move with the direction of the wind and current, the wind exercising the greater influence on the direction of its movement, and the mass moves at times westward and northward or towards the shores of New Jersey or Long Island according to the direction and velocity of the wind.

13. To so much of Finding of Fact (16) (Report of Special Master, p. 25) as finds that the mass spreads out on the surface of the water gradually breaking up into smaller areas and moving for indefinite periods with the wind, some of the materials being on the surface and some in suspension.

14. To so much of Finding of Fact (16) (Report of Special Master, p. 26) as finds that some of the lobster fishermen have followed the floating garbage from the place where it is dumped by the defendant in the ocean to where it went ashore on New Jersey's beaches.

15. To so much of Finding of Fact (16) (Report of Special Master, p. 26) as finds that about 25% of the self-addressed, stamped postal cards deposited in sealed bottles dropped in garbage in the ocean immediately after the dumping by New York City scows came back to the parties depositing same by mail from persons along the New Jersey and Long Island shores and from further north.

16. To so much of the Finding of Fact (7) (Report of Special Master, p. 16) as finds that the deposits of garbage and refuse produce unhealthful conditions interfering with and frequently preventing the comfort and enjoyable use of the beaches and sea, it being dangerous to leave children unattended on the beach while the deposits are there because of things they may pick up, some of the same being unmentionable; that broken glass and nails in pieces of wood have been the cause of severe wounds to persons on the beach or in bathing, and that it is a menace to health and tends to injure business and property values and rental values.

17. To so much of the Finding of Fact (7) (Report of Special Master, p. 16) as finds that during June, July

and August, 1929, there were in Asbury Park, a considerable increase over the preceding year of cases of external otitis which is a swelling or inflammation of the ear canal, and of cases of infection of the middle ear requiring the drum to be opened, and of sinus affected cases resulting from bathing in the ocean, and that one or more of the coast guard incurred a skin infection from the water which gave them considerable trouble.

18. To so much of the Finding of Fact (16)—Appearance and Movement—(Report of Special Master, p. 27) as finds that large parts of these floating and submerged areas of garbage and refuse, dumped by the defendant are driven and carried by winds and water to and upon the shores of the planitiff, and constitute the objectionable materials thereon and in the adjacent water, hereinbefore described

19. To so much of the Finding of Fact, or Conclusion of Law, or both, set forth under the heading—Some Questions of Law—1. Trespass (Report of Special Master, p. 41) as finds that large areas of garbage and refuse floating upon or held in suspension by the water, which have been dumped by defendant's scows, are driven and carried by wind and water to and upon the shores of plaintiff and other portions or areas thereof are held for indefinite periods in the waters above soil owned by plaintiff and do great injury to fishing and bathing in such waters.

20. To so much of the finding of fact, or conclusion of law, or both, set forth under the heading "Some Questions of Law—3. Nuisance" (Report of Special Master, pp. 50-51) as finds that the conditions on plaintiff's shores and adjacent waters produced by garbage and other objectionable materials alleged in the bill are proved by uncontradicted evidence. A summary of the

facts found may be stated as follows: Along the shores are many summer resorts and their beaches, and when unaffected by the bad conditions mentioned are pleasure grounds for thousands of visitors. * * * The deposits interfere with, and until removed frequently prevent, the use and enjoyment of the beaches for the purposes to which the latter are adapted and for the comfortable and enjoyable use of which people visit them. * * * Many visitors leave the resorts because they cannot use the beaches when littered or secure the surf bathing when the waters adjacent hold garbage and refuse in suspension and the chief value of the shores below high water mark and the soil under the adjacent waters for at least three nautical miles is in the fisheries and the fact that they can find and do afford the attractions pertaining to summer resorts, which fisheries and attractions are seriously interfered with by the deposits in question.

21. To so much of the finding of fact, or conclusion of law, or both, set forth under the heading "Some Questions of Law—3. Nuisance" (Report of Special Masters, p. 53) as finds that conditions described in this case amount to a public nuisance, and that the State and communities affected should not be required to tolerate the same.

22. To so much of the finding of fact, or conclusion of law, or both, set forth under the heading "Some Questions of Law—5. Municipality—Decree of Proof" (Report of Special Master, pp. 56-57) as finds that even if the stricter rule of evidence be applied, I think the only reasonable conclusion to be reached under all the evidence is that the objectionable conditions on the beaches and in the adjacent waters complained of in this suit are caused by and due to the action of the defendant in dump-

ing its garbage and refuse into the waters of the ocean as already stated and that there has not only been an invasion of serious magnitude of the plaintiff's rights extending through some years but it is continuing and is threatened for an indefinite period.

23. To so much of the finding of fact, or conclusion of law, or both, set forth under the heading "Some Questions of Law—6. Jurisdiction" (Report of Special Master, p. 59) as find that the defendant has created and continues to produce a public nuisance on the beaches and property of the State of New Jersey and that the plaintiff is entitled to relief in accordance with the prayer of the bill.

24. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 46) that six different inspections made by an official from the Office of the United States Supervisor of the Harbor of New York in February, March and April, 1929, of garbage dumpings by New York City scows at the 8 and 12 mile dumping points where the drift of the garbage was followed for periods of from 12 to 24 hours each did not reveal a single occasion when the garbage reached any shore.

25. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 48) that when dumped, the lighter portion of the garbage floats while the heavier portion sinks, but that gradually some of that which at first floated, sinks, leaving a very considerably smaller portion floating at the end of 24 hours than at the time of dumping.

26. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 52) that garbage and refuse dumped by the de-

fendant into the ocean as aforesaid, has not found its way in any substantial quantities into the territorial waters or onto the beaches of the plaintiff.

27. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 54) that the dumping of garbage and refuse at sea as aforesaid by defendant, has not caused substantial injury to the navigation of the ocean by the plaintiff or its citizens or visitors.

28. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 55) that the dumping of garbage and refuse at sea as aforesaid by the defendant, has not caused any substantial injury to bathing or bathing rights or property connected therewith on the part of the plaintiff or any of its citizens or visitors.

29. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 56) that the dumping of garbage and refuse at sea as aforesaid by the defendant, has not caused any substantial injury to fishing or fishing rights or property used in connection therewith of plaintiff or its citizens or visitors.

30. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 57) that the dumping of garbage and refuse at sea as aforesaid by the defendant, has not substantially injured or menaced and does not substantially injure or menace the health, safety, comfort or welfare of the State of New Jersey or any of its citizens or visitors thereto.

31. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding

of Fact 58) that the dumping of garbage and refuse at sea as aforesaid by the defendant, has not caused any substantial injury to the commerce of the plaintiff or its citizens.

32. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 59a) that the prevailing winds along the coast of the plaintiff range from southwest to northwest—offshore winds.

33. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 60) that the dumping of garbage and refuse at sea by defendant as aforesaid, has not caused and does not cause any substantial depreciation to the value of the plaintiff's property or that of its citizens, has not retarded and does not retard the economic development of plaintiff's territory, and that of its municipalities in any substantial manner and does not impose in any substantial manner upon plaintiff's municipalities and inhabitants a constant or considerable expense in removing defendant's garbage and refuse from public and private property.

34. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 65) that the plaintiff failed to produce on the trial of this action, any scientific or expert evidence as to the effect of ocean currents or tides upon the movement of objects dumped into the ocean at from 10 to 22 miles from the New Jersey shore, and floating partially or wholly submerged in the ocean.

35. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 7) that the dump-

ing in the Atlantic Ocean by the defendant as aforesaid, of garbage and refuse, has not obstructed and does not obstruct or impede the navigation of the waters of the United States or of the State of New Jersey.

36. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 8) that the dumping in the Atlantic Ocean by the defendant as aforesaid, of garbage and refuse, has not injured or destroyed and does not injure or destroy the bathing or fishing rights or property therein of the plaintiff or its citizens or visitors thereto.

37. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 9) that the dumping in the Atlantic Ocean by the defendant as aforesaid, of garbage and refuse, has not regulated or destroyed and does not regulate or destroy the commerce of the State of New Jersey and/or its citizens in violation of Article I, Section 8, paragraph 3 of the Constitution of the United States or of any statute of the United States.

38. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 10) that the dumping in the Atlantic Ocean by the defendant as aforesaid of garbage and refuse, has not taken and does not take any property or right of the plaintiff and/or its citizens, without due process of law in violation of Article XIV, Section 1 of the Constitution of the United States.

39. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 13) that the dumping in the Atlantic Ocean by the defendant as afore-

said, of garbage and refuse, has not deprived and does not deprive the plaintiff and/or any of its citizens of the natural advantages of its or their position along the seashore contrary to the sovereign rights of said State as a member of the Union or of any of such rights.

40. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 16) that the dumping in the Atlantic Ocean by the defendant at the places and in the manner aforesaid, of garbage and refuse, has not been and is not an unreasonable disposition of the same as a matter of law.

41. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 18) that the plaintiff herein must prove its claims and case against the defendant herein by clear and convincing evidence.

42. To the failure and refusal of the Special Master to conclude as a Matter of Law as requested by the defendant (Proposed Conclusion of Law 19) that the plaintiff herein failed to prove by clear and convincing evidence that any substantial portion of the garbage and refuse which found its way into the waters of the State of New Jersey or onto its shores or beaches was that which was dumped into the Atlantic Ocean by the defendant.

43. To the failure and refusal of the Special Master to conclude as a matter of law, as requested by the defendant (Proposed Conclusion of Law 17) that the dumping in the Atlantic Ocean by the defendant at the places and in the manner aforesaid, of garbage and refuse has not created and does not create a public nuisance as a matter of law in respect to the plaintiff and/or its citi-

zens or visitors or a public nuisance which seriously impairs the usefulness, wholesomeness and safety of the waters, beaches and shorefront facilities of the plaintiff, or its citizens, or damages the property of said plaintiff, its municipalities and citizens or their health, safety and welfare.

C. That compliance by the defendant with the provisions of the Act of Congress of June 29, 1888 (29 stat. 209) as amended and the permits to dump garbage in the Atlantic Ocean at a distance in excess of one marine league from the shores of New Jersey issued by the Supervisor of the Harbor of New York in accordance with said Act, do not relieve the defendant from the effect of the public nuisance resulting from and created by said dumping.

44. To so much of the Finding of Fact set forth under the heading "Some Questions of Law —2. Permits" (Report of the Special Master, p. 45) as finds that the Act (29 Stat. 209, as amended) contemplated that the Supervisor prescribe certain limits, but there is no evidence in this case as to what limits were prescribed.

45. To so much of the Finding of Fact or Conclusion of Law or both, set forth under the heading "Some Questions of Law—2. Permits" (Report of Special Master, p. 47) as finds, or purports to find, that although the defendant dumps its garbage under permits issued by the Supervisor of the Harbor of New York at points in excess of one marine league from the shore of New Jersey, it is difficult to understand how that fact affords any defense in this case.

46. To so much of the Conclusion of Law set forth under the heading "Some Questions of Law—2. Permits" (Report of the Special Master, p. 47) as concludes that

the authority of the Federal Government does not extend beyond the requirements of navigation.

47. To so much of the Conclusion of Law set forth under the heading "Some Questions of Law—2. Permits" (Report of the Special Master, p. 48) as concludes that the powers which the Supervisor has under the statute and the effect to be given the permits authorized to be issued are to be strictly construed because of the effect of the dumping upon the rights of others.

48. To so much of the Finding of Fact or Conclusion of Law, or both, set forth under the heading "Some Questions of Law—2. Permits" (Report of Special Master, p. 48) as concludes that the fact that the defendant is a municipal corporation does not afford immunity from the results of its own action.

49. To so much of the Finding of Fact or Conclusion of Law, or both, set forth under the heading "Some Questions of Law—2. Permits" (Report of Special Master, p. 49) as concludes that the Act of 1888, as amended, furnishes no defense to the defendant and that compliance with permits from the Supervisor of the Harbor acting under the provisions of that Act does not furnish a defense nor relieve it from the effect of a public nuisance resulting from or created by its action.

50. To the failure and refusal of the Special Master to conclude as a matter of law as requested by defendant (Proposed Conclusion of Law 14) that the dumping in the Atlantic Ocean by the defendant as aforesaid of garbage and refuse under permit from, and supervision of, the Government of the United States through its Supervisor of the Harbor of New York and in accordance with the provisions of Title 33, Chapter 9; Sections 441-451 inclusive, U. S. Code (approved June 30, 1926) and preceding statutes on which founded, is a compliance with

each and every regulation and statute of the United States relating to navigation, commerce and/or any other subject over which Congress has exercised the jurisdiction of the United States.

D. That such garbage and refuse as reaches the plaintiff's shores from the dumpings by coastwise and other vessels and from other sources is negligible in comparison with that dumped by defendant and reaching plaintiff's shores and constitutes no defense to plaintiff's complaint.

51. To so much of the Finding of Fact set forth under the Heading "Some Issues of Fact" (Report of Special Master, p. 31) as finds, or purports to find, that there is evidence that only some coastwise and other vessels discharge garbage refuse into the ocean.

52. To so much of the Finding of Fact set forth under the heading "Some Issues of Fact" (Report of Special Master, p. 31) as finds, or purports to find, that a witness introduced by the defendant made an estimate to the effect that there were only twenty vessels a day going and coming from southern ports to New York.

53. To so much of the Finding of Fact or Conclusion of Law, or both, set forth under the heading "Some Issues of Fact" (Report of Special Master, p. 35) as finds or concludes that testimony that some vessels discharge garbage and refuse after clearing from New York, falls short of establishing a custom by other vessels.

54. To so much of the Finding of Fact set forth under the heading "Some Issues of Fact" (Report of Special Master, p. 36) as finds, or purports to find, that whatever garbage and refuse reaches the plaintiff's shores from coastwise and other vessels and other causes and other dumpings than those of the defendant are negligible in

comparison with that constantly being dumped by the defendant and frequently carried by winds and waves from the dumping places to and upon plaintiff's shores as hereinbefore stated.

55. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 27) that the scows of private contractors, having no connection with the City of New York, containing "cellar dirt," i. e., debris from buildings that have been torn down consisting of joists, timbers, laths, plaster, etc., of a very light kind have for years been dumped and are being dumped into the Atlantic Ocean under permit from the Supervisor of the Harbor of New York at a point about 4 miles southeast of Scotland Lightship.

56. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 33) that cargoes of condemned foodstuffs, vegetables, fruits, etc.) are also dumped at sea under permit from the Supervisor of the Harbor of New York at a point 25 miles from the New Jersey shore.

57. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 34) that Brooklyn Navy Yard scows containing refuse and garbage also dumped at sea at the regular dumping points at which New York City garbage is dumped.

58. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 35) that the Supervisor of the Harbor of New York in his report for 1929, stated that it is probable that a great deal of garbage is dumped both outside and inside the harbor entrance by the enormous tonnage passing in and out of New York Harbor and also that the local floating equipment throws more or less garbage overboard.

59. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of

Fact 36) that the records of the Collector of the Port of New York show that in 1928-1929 the following was the number of vessels clearing from or entering such port from points south thereof for periods of two months at a time; months of December 1928 and January 1929, foreign and coastwise vessels entering, 1,227; clearing, 1,173. Months of July and August, 1929, foreign and coastwise vessels entering, 1,105; clearing, 1,192.

60. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 37) that the sea lane or route for coastwise ships going to and coming from points south of New York is about 2½ to 3 miles over the New Jersey coast at Seabright, Monmouth Beach and Asbury Park; 5 miles at Sea Girt and 8 Miles at Barnegat Lighthouse.

61. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 38) that practically all freight and passenger ships leaving and entering New York Harbor (especially those leaving) dump more or less garbage and refuse in such sea lane.

62. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 39) that many freight and passenger lines and ships feed their crews in port and none of their garbage or refuse is removed by the City or disposed of by the ship while in port, but such accumulations consisting of bottles, tin cans, electric light bulbs, pieces of meat, fruit, other food waste, wood, mattresses, pillows, shoes, old clothes, boxes, barrels, crates, etc., are dumped after passing Scotland Lightship.

63. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 40) that passenger and freight ships often anchor in great numbers during a fog for 24 hours or more outside of the harbor and dump garbage accumulated during that period into the sea where they are anchored.

64. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 41) that the holds of cargo boats are usually swept in port after the removal of the cargo and before reloading; that such sweepings and also sweepings from the forecastle are placed on deck for dumping in addition to garbage and refuse and all are dumped in said sea lane for coastwise ships shortly after passing Scotland Lightship on the way south.

65. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Find of Fact 42) that fruit, vegetables, poultry and other supplies delivered to the ships in port to feed passengers and crews, are usually packed in crates, barrels and boxes which have the names on them of New York dealers from whom they are bought, and such crates, boxes and barrels, partly broken up, are on most ships piled on deck and dumped with other refuse in said sea lane shortly after passing Scotland Lightship on the way south.

66. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 45) that insufficiently treated and unsanitary sewage from the cities of Long Branch and Asbury Park on the Atlantic Coast of New Jersey has been and is being discharged into the Atlantic Ocean within a short distance from the beaches of each of those cities.

67. To the failure and refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 64) that from 1896 to 1918, except for a few months in 1903 (1906) no New York City garbage and only a part of its refuse was dumped at sea, yet during that period a large amount of garbage and refuse was washed up into the New Jersey waters and onto its Atlantic shore front beaches.

68. To the failure and refusal of the Special Master to Find as requested by defendant (Proposed Finding of Fact 66) that the deposit in substantial quantities in the Atlantic Ocean at points varying from 2½ to 8 miles from the Atlantic shore front of the plaintiff State commencing with the minimum distance at Sandy Hook and extending to Barnegat Lighthouse where the maximum distance existed, of garbage, refuse and cellar dirt (material taken from demolished buildings in New York City) by steamships and other floating equipment and by scows of private contractors, of the same kind and character as that deposited in said ocean as aforesaid by defendant much further away from said shore front of the plaintiff, and the deposit of garbage and refuse in said ocean by the United States (Brooklyn) Navy Yard authorities at the points where defendant dumped and the deposit in said ocean less than ½ mile from plaintiff's said shore front of insufficiently treated and unsanitary sewage from the cities of Long Branch and Asbury Park, makes it impossible to determine as a fact, whether garbage and refuse and other offensive matter in substantial quantities is deposited by defendant in the waters of the State of New Jersey or on its beaches.

69. To the failure and refusal of the Special Master to conclude as a matter of law as requested by defendant (Proposed Conclusion of Law 20) that by reason of the deposit in substantial quantities of garbage, refuse, cellar dirt and unsanitary sewage in the Atlantic Ocean by agencies other than defendant, at points much nearer the coast of plaintiff or no further therefrom than where the deposits of garbage and refuse are made by defendant in said ocean as aforesaid, it is impossible to determine whether such garbage and refuse deposited by defendant in said ocean off the coast of the plaintiff, reaches its waters and beaches in substantial quantities, and therefore defendant is not liable to the plaintiff for the injuries

alleged to have been suffered by the plaintiff, its citizens and visitors.

E. Particular exceptions to the Special Master's report and to his failure to find facts and make Conclusions of Law as requested by defendant and in support of its contention that on all of the evidence, a case for equitable relief in favor of the plaintiff, was not made out.

70. To so much of Finding of Fact (14)—Supervisor's Reports—(Report of the Special Master, p. 23) and of Finding of Fact (17)—Incinerators—(Report of Special Master, p. 29) as finds that the first incinerating plant was put in operation by the City of New York in February, 1924.

71. To so much of Finding of Fact (17)—Incinerators—(Report of the Special Master, p. 30) as finds that the evidence does not show the cause of the apparent delay by the defendant in adopting and putting into operation the incinerating system, and that it was in 1924, some five years after the defendant began dumping at sea, that its first incinerator was put into operation, and during the next succeeding five years others were built. That those constructed and in use fall far short of taking care of the garbage and refuse situation.

72. To so much of Finding of Fact, or Conclusion of Law, or both, (17)—Incinerators—(Report of Special Master, p. 30) as finds that the delay of the defendant in adopting a proper method of disposal has been unreasonably long.

73. To the failure or refusal of the Special Master to find as requested by the defendant (Proposed Finding of Fact 17) that three incineration plants were built in the Borough of Manhattan as a result of an appropriation of

$5,000,000 made in July, 1921, the first being completed in February, 1924, the second in November, 1925, and the third on October 1, 1928, the cost of each incinerator being about $1,000,000, exclusive of the cost of the land on which built.

74. To the failure and refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 19) that the commencement of building operations on a fourth site was halted by injunction duly obtained in the Supreme Court of the State of New York.

75. To the failure or refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 20) that in the Borough of Brooklyn there are two incinerators, each with the capacity of 100 tons a day and three with a capacity of 200 tons a day each, all now in operation, built by a contractor under a contract to dispose of all material that may be delivered, and since December 1, 1929, no garbage from that borough has been dumped at sea.

76. To the failure or refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 21) that in the Borough of Queens there are now nine incinerators operating with an average daily garbage and refuse consumption of from 100 to 270 tons and that borough has never dumped any of its garbage at sea.

77. To the failure or refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 22) that in the Borough of Richmond there are now three incinerators in operation and none of the garbage from that borough has been or is now being dumped at sea.

78. To the failure or refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 24) that approximately only 27 per cent. of the gar-

bage collected in the City of New York is dumped at sea, the greatest proportion of which comes from the Borough of The Bronx, and such amount will be continually reduced.

79. To the failure or refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 63) that the dumping in the ocean by the defendant more than a marine league from the New Jersey coast at points 8, 12 and 20 miles southeast of Scotland Lightship designated by the United States Supervisor of the Harbor of New York and under conditions imposed by him of about 27 per cent. of the garbage collected by said City is not in fact an unreasonable disposition of its total garbage collections, pending the carrying out of its plans for the installation of additional incinerators.

80. To the failure or refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 61) that the size, summer population, property investments and assessed value of property of practically all of the New Jersey communities and municipalities located along the Atlantic Ocean shore front from Highlands to Seaside Park has increased greatly during the period from 1919 to 1929, during which the City of New York has been dumping a portion of its garbage and refuse into the Atlantic Ocean as aforesaid.

81. To the failure or refusal of the Special Master to find as requested by defendant (Proposed Finding of Fact 62) that, although much more garbage and refuse has been dumped at sea by the City of New York during the summer months than during those of winter, the summer population of, and visitors to; all of the New Jersey Atlantic shore front communities and municipalities claimed by plaintiff to have been injured, is and are many times greater than in winter.

82. To so much of the Finding of Fact set forth in the report of the Special Master under the heading "Some Issues of Fact," page 34, as finds that as to the Long Branch sewer the evidence consists only of a plan of the sewage system and some evidence that complaints were at one time made to the Department of Health, which investigated the same, and that the matters were satisfactorily adjusted.

83. To so much of the Finding of Fact set forth in the report of the Special Master under the heading "Some Conclusions of Law," page 50, as finds that some scows have left upon them considerable quantities of garbage or refuse after their gates have been thrown open to release the contents, and these remnants are cast off by the men in charge as the scows are being taken back from the dumping area, and that the general practice continues, more materials being dumped in 1929 than in the preceding year.

84. To the failure and refusal of the Special Master to find, as requested by the defendant (Proposed Finding of Fact 3), that by Chapter 378 of the Laws of 1897 of the State of New York, known as The Greater New York Charter, various municipalities of the State of New York were united and consolidated into the City of New York, which was thereby divided into five boroughs, known, respectively, as the boroughs of Manhattan, The Bronx, Brooklyn, Queens and Richmond.

85. To the failure and refusal of the Special Master to find, as requested by the defendant (Proposed Findings of Fact 5 and 6), that by said Chapter 378 of the Laws of 1897 of the State of New York, a Department of Street Cleaning was created in the municipal government of said city, with jurisdiction over the removal and dis-

position, as often as the public health required, of ashes, refuse, street sweepings and garbage collected in said city, but that by Chapter 466 of the Laws of 1901, jurisdiction over the removal and disposition of said substances collected in the Boroughs of Queens and Richmond was transferred to the presidents of said boroughs.

86. To the failure and refusal of the Special Master to find, as requested by the defendant (Proposed Finding of Fact 7), that by Local Law No. 13 of 1929, of the City of New York (duly adopted by the Municipal Assembly of said city in accordance with the provisions of Chapter 363 of the Laws of 1924 of the State of New York) in force from and after December 1, 1929, amending and supplementing said provisions of said Greater New York Charter, as amended, a Department of Sanitation was created, to which was transferred jurisdiction over the removal and disposition of ashes, refuse, street sweepings and garbage collected in all of said five boroughs of said city.

87. To the failure and refusal of the Special Master to find, as requested by the defendant (Proposed Finding of Fact 15) that, on collection, this garbage is taken to docks or dumping boards on the waterfront of said city and is then dumped into city-owned barges, which are designated by the initials of the departmental name and letters of the alphabet, and these are towed to sea by tugboats chartered from, and in charge of, contractors, and the contents are there dumped.

88. To the failure and refusal of the Special Master to conclude, as a matter of law, as requested by the defendant (Proposed Conclusion of Law 1), that the defendant, The City of New York, is a municipal corporation and a political subdivision of the State of New York, administering governmental functions in the localities de-

scribed in Sections 1 and 2 of Chapter 378 of the Laws of 1897 of the State of New York, as amended by Chapter 466 of the Laws of 1901 of said State, and subdivided into five boroughs therein described.

89. To the failure and refusal of the Special Master to conclude, as a matter of law, as requested by the defendant (Proposed Conclusion of Law 2), that the Department of Street Cleaning and the Presidents of the Boroughs of Queens and Richmond of the City of New York, for many years prior to and until December 1, 1929, and thereafter the Department of Sanitation thereof, had jurisdiction in said city over the removal and disposition, as often as the public health required, of ashes, refuse, street sweepings and garbage in said city.

90. To the failure and refusal of the Special Master to conclude, as a matter of law, as requested by the defendant (Proposed Conclusion of Law 12), that the dumping in the Atlantic Ocean by the defendant, as aforesaid, of garbage and refuse has not violated, and does not violate, Public Laws of New Jersey, 1882, page 155 (3. Compiled Statutes of New Jersey "Pilots", Sec. 47, p. 3958), nor any other statute of the State of New Jersey.

91. To the failure and refusal of the Special Master to conclude, as a matter of law, as requested by the defendant (Proposed Conclusion of Law 21), that the plaintiff has failed to prove facts sufficient to constitute a cause of action in equity for the relief demanded in the complaint or for any relief whatever in equity.

92. To the failure and refusal of the Special Master to conclude, as a matter of law, as requested by the defendant (Proposed Conclusion of Law 22), that the

defendant is entitled to a dismissal of the complaint herein, with costs to the defendant.

F. Recommendations for Decree.

The defendant also objects and excepts to the recommendations for a decree made by the Special Master in the following particulars:

93. To subdivision No. 1 (Report of Special Master, pp. 59-60) in its entirety.

94. To subdivision No. 2 (Report of Special Master, p. 60) in its entirety.

Respectfully submitted,

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